

## A Framework for Measuring the Costs of Paths to Justice

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### Abstract

The official justice mechanisms are perceived as expensive and unaffordable for the majority of people. In this article, I review the literature on barriers to justice and contemplate the identified barriers as costs that users of justice incur on their paths to justice. Then I elaborate a framework of categories of the private costs of justice, which should facilitate the measurement and comparison of costs of the paths to justice. Using the criterion of substance of the costs, the framework recognizes three main categories – out-of-pocket costs, opportunity costs and intangible costs. For each cost category, I discuss the relevant measurement and validation challenges. A conclusion of the study is that despite the focus of policy actions and research placed on the out-of-pocket costs of justice, the costs from the other two categories are a significant challenge for the accessibility of the paths to justice. The use of the framework is recommended as a more balanced approach to measuring, comparing and understanding the existing barriers faced during the paths to justice.

### 1. INTRODUCTION

People needing access to justice might face numerous barriers on the quest to solve their problems. As the paths to justice could take a long time, their effectiveness and efficiency could be regarded as insufficient, while courtrooms might be geographically unreachable or the people in need might fear retaliation. It is the high costs of justice, however, which epitomize the concerns of users, policy makers and service providers with the unreachable justice. In fact, no other barrier has been so frequently tackled with regulatory and institutional reforms in modern times. High costs are also blamed as the main cause of the myriad of unresolved legal problems and disputes.

An integral part of the legal culture in both developed and developing countries is the certainty that justice is expensive. In many jurisdictions, the costs of litigation are deemed prohibitive for the majority of the population, out of proportion and a major source of legal uncertainty. The increase of social and private costs of litigation has been a growing concern in the Western

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world for the last four decades<sup>1</sup>. Dispute resolution processes are rarely considered affordable and accessible. Namely, litigation is considered as overly expensive, unpredictable and time consuming. One of the most pressing drivers for wholesale reforms of the national legal systems is the assertion that access to justice is becoming prohibitively expensive. In Lord Woolf's famous "Access to Justice Final Report," costs of litigation are posited as the "most serious problem besetting our litigation system"<sup>2</sup>.

Examples of the negative effects of high costs of justice are found on virtually every path to justice. A tenant who disagrees with the landlord, for example, might give up the issues when faced with the investments needed to match the landlord's legal power, while buyers of defective consumer goods from an internet site may swallow the loss if the cost of obtaining justice outweighs the value at stake. Meanwhile, a victim of violent crime might be discouraged from seeking justice because of the anticipated stress and negative emotions. In all these hypothetical but realistic accounts of paths to justice, the costs materialize in different shapes and sizes. What is common, however, is that the costs of the paths to justice represent a significant barrier on the pathways to justice. The intention of this article is to analyze the existing costs of justice and organize them into a coherent framework. The framework will group the individual cost of items into broader categories in order to make comparisons between different paths to justice. Because paths vary enormously in their goals, structure and outcomes, each path will have a unique structure of costs which will be impossible to compare to others. How costly is a consumer dispute compared to a divorce? How are the costs of litigation over monetary debt compared to the immigration and naturalization procedure? With the developed framework I intend to group the costs of justice into broader categories, which will make the comparison between paths feasible.

The costs of justice do not exist independently from the needs of justice and paths to justice. Whenever a person faces a need for justice<sup>3</sup>, she has to embark on a path to justice. A path to justice is conceptualized as a commonly applied

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<sup>1</sup> PHILIP L. WILLIAMS & ROSS A. WILLIAMS, *The Cost of Civil Litigation: An Empirical Study*, 14 *International Review of Law and Economics* 73, (1994); C. SILVER, *Does civil justice cost too much?*, 80 *Texas Law Review* 2073, (2002); DAVID M. TRUBEK, et al., *The Costs of Ordinary Litigation*, 31 *UCLA Law Review* 72, (1983); MAURO CAPPELETTI & BRYANT GARTH, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo Law Review* 181, (1978).

<sup>2</sup> HARRY WOOLF, *Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO Books. 1996).

<sup>3</sup> MAURITS BARENDRECHT, et al., *Priorities for the Justice System: Responding to the Most Urgent Legal Problems of Individuals* Tilburg University Legal Studies Working Paper No. 002/2008, available at <http://ssrn.com/paper=1090885>.

process which users of justice address in order to cope with their justice needs<sup>4</sup>. Both formal and informal processes could be positioned under the broad scope of the definition of path to justice. An informal negotiation, or an out of court settlement, could satisfy the users' needs for justice as much as the trial procedures do. Using the definition above, I analyze the different types of costs that a person has to make in order to travel from a beginning to an end in a path to justice. According to their properties, the costs are grouped into broader categories.

A framework for measuring the costs of obtaining access to justice should demarcate the beginning and the end of a path to justice. In real life, it is often difficult, if not impossible, to define a single moment in which the process starts or ends. For the sake of clarity, I operationalize the beginning of a path to justice as the moment when the user of justice first addresses the process. The first active and deliberative involvement of the user into the process could be explicated through different acts – a search for information, an acceptance of advice, the filing of documents, etc. With the selection of a verifiable moment to mark the beginning of a procedure, our methodology attempts to reduce the error from varying conceptualizations of paths to justice.

Similarly, an end to the procedure is defined as the moment when the party receives an outcome from the process. An outcome could be a final decision by a neutral party, a joint agreement of the parties, or one of the parties quitting the process. Our methodological framework is indifferent to the favourability of the outcome, its enforceability, or the opportunities to challenge the outcome through other processes<sup>5</sup>. A path to justice ends with a certain instance of an outcome, while our interest is to measure the costs that the user of justice incurs on this path to justice.

In order to achieve its goal, a framework for measuring the costs of paths to justice should address a series of questions. The measurement instrument has to conceptualize, break down and operationalized the different costs that users of justice face. In the next section, I discuss the costs of paths to justice and make the distinction between social and private costs. Then, I identify barriers to justice and construct them as costs. Based on the review of the barriers to justice, the individual cost categories are classified into categories that are more general. At the next stage, the identified categories of costs will be

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<sup>4</sup> MARTIN GRAMATIKOV, *Methodological Challenges in Measuring Cost and Quality of Access to Justice* Tilburg University Legal Studies Working Paper No. 005/2008, available at <http://ssrn.com/paper=1099392>.

<sup>5</sup> Together with the costs of the paths to justice, the instrument measures the perceptions regarding the equality of the procedure and the quality of the outcome. In this framework, the extent of outcome enforceability will be accounted as a facet of the quality of the outcome.

operationalized into items of the measurement instrument. The last chapter will summarize the findings and state my conclusion.

## 2. COSTS OF JUSTICE

Costs of justice are a deceptively simple category. People often refer to justice as costly, which implies inherently high costs. However, what is a cost for one user of justice could be an investment for another. A busy professional could see the cost of a path to justice in the amount of hours spent, whereas an indigent person could be restrained by the monetary costs. In order to provide a valid measurement framework of the costs of justice, I have to identify the costs in an unambiguous manner. The empirical legal literature contributes little to the definition of the costs of justice.

Before proceeding with a substantial definition of the costs to justice, I have to demarcate the difference between the costs of the social problem and the costs of the dispute-resolution mechanism. A person who buys a faulty TV for a net of €500 from the local shop will register this amount as damage from the transaction. Instead of lumping the problem, the consumer might decide to take her chance and try to solve the problem with the available state or non-state justice mechanisms. Paying for legal advice, making phone calls, and spending time and emotions contacting the other party or the neutral party add to the existing damage. These costs are made because the consumer is seeking redress for her problem. Measuring the costs of paths to justice requires separating the cost of the social problem and the cost of travelling the path to justice. The latter category could be called *transaction costs* if the paths to justice are seen as forms of social transactions. Many studies identify this analytical distinction and measure categories such as *transaction costs*, *transfers costs*, *total amount of money expended*, *total spending* and *total litigation costs*<sup>6</sup>. In criminal justice research, similar concepts could be found under the title of *average total costs per victim*<sup>7</sup>, although in this domain the distinction between cost of the crime and

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<sup>6</sup> SILVER at 2074; STEPHEN J. CARROLL, et al., *Asbestos Litigation* (RAND Institute for Civil Justice ed., RAND Corporation. 2005); HERBERT M. KRITZER, *Lawyer fees and lawyer behavior in litigation: What does the empirical literature really say?*, 80 *Texas Law Review* 1943, (2002); JENNIFER KING RICE, *The cost of working together: A framework for estimating the costs of comprehensive support systems for children*, 33 *Administration & Society* 455, (2001); CYNTHIA CONRAD, *Measuring Costs of Child Abuse and Neglect: A Mathematical Model of Specific Cost Estimations*, 29 *Journal of Health and Human Services Administration* 103, (2006); MARK A COHEN, *Measuring the costs and benefits of crime and justice*, 4 *Criminal Justice* 263, (2000); GEOFFREY P. MILLER, *Commentary on the Costs of Civil Justice*, 80 *Texas Law Review* 2115, (2002); MARK A COHEN, *The Costs of Crime and Justice* (Routledge. 2005).

<sup>7</sup> TED R. MILLER, et al., *Costs of Juvenile Violence: Policy Implications*, 107 *Pediatrics* 1, (2001).  
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the additional costs of pursuing justice has rarely been made<sup>8</sup>. Below, I discuss this distinction as possibly being a major challenge for the measurement of the costs of justice.

Using the path to justice paradigm, the costs of justice are defined as *the resources which the user needs in order to travel from the beginning to the end of a path to justice*. With this definition, I exclude the impact of the underlying social problem from the costs, and instead emphasize the need for the user to drive the justice process to a point at which an outcome is available, or some other circumstance to bring the process to an end. The definition is holistic – it embraces all costs incurred on the quest to solve the problem. As discussed above, the beginning of the path to justice is the first verifiable step of the user to solve the problem. In the case of a trial procedure, this will mean that the definition will include the pre-trial costs, where they will be made in relation to the specific path to justice. The definition does not discriminate between optional and compulsory costs. Some paths to justice require certain investments regardless of users' discretion – i.e. the court fees in litigation are compulsory. Other costs are optional - the user sacrifices resources in order to receive a better quality of the procedure or the outcome. The total costs of path to justice include both the optional and compulsory costs of justice. I discuss the feasibility of this classification criterion below<sup>9</sup>.

The goal of the developed framework is to facilitate the measurement of the costs of discrete paths to justice. From this perspective, a distinction should be made between the social and private costs of justice. The social costs are distributed among the members of the society or particular community whose needs are served by the justice process. There are significant social costs associated with the design and maintenance of a system of legal rules and institutions intended to deliver justice outcomes. Legal systems and, in particular, justice institutions are unique examples of public goods based on a mixed model of funding. Emanuel Savas<sup>10</sup> uses a matrix of two factors to classify goods and services that require government intervention to maximize benefits to society from their delivery. The two criteria are consumption (whether a good or service is consumed collectively or privately) and exclusion (whether free riders could be prevented from using the resource). Another way to draw the line between the private and public costs of justice is to exclude the externalized costs from the framework. Whenever the costs of the dispute

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<sup>8</sup> MARK A. COHEN, et al., Willingness-to-Pay for Crime Control Programs, available at <http://ssrn.com/paper=293153>.

<sup>9</sup> See section 3.12

<sup>10</sup> EMANUEL S. SAVAS, *Privatization - The Key to Better Government* (Chatham House Publishers. 1987).

resolution are transferred to third parties, the costs are deemed to be externalities. Such external costs are an unlikely barrier to justice and will not be integrated in the framework of the costs of paths to justice.

To some extent, the assumptions of Savas' classification could be relaxed. An extreme interpretation could lead to the conclusion that justice processes are private goods because they are consumed individually (the parties in a dispute resolution improve their own welfare), and non-payers could be excluded (those who do not incur the costs do not receive justice). Both criteria, however, contradict the very foundations of the rule of law paradigm. Indeed, the disputants potentially obtain benefits from the existing path to justice. Society, however, is also benefiting incrementally from each instance of delivered justice by improved legal certainty and predictability, decreased costs for offsetting legal risks and improved trust in the institutions. Hence, the outcomes of the justice system could be seen as goods in which the benefits are consumed collectively. The immediate users of path to justice benefit directly, whereas the rest of the society/community receive indirect benefits.

Similar arguments could be developed with regard to the second criterion – excludability. Dispute resolution processes (even mass claims) involve a limited number of persons who have a certain degree of interest in a particular dispute. Free riders are prevented from frivolously joining dispute resolutions through the *locus standi* doctrine. However, as discussed above, the external effects of the functioning justice processes could not be limited to the parties in the dispute. Positive or negative effects affect various social groups in different forms and intensity.

The consequence of the mixed character of justice systems is that they are often funded as semi-public/semi-private services. Disputing parties are expected, to a varying extent, to incur these costs through expenses such as court and arbitration fees, expert witness's fees, etc. These expenses, however, do not fully coincide with the total cost of the justice process. Through mechanisms such as public budgets or insurance products, the societies and communities mobilize public resources in order to cover the gap. Because of the public character of these decisions, one could label these costs as *social costs of justice*. On the other hand, the costs faced by individual users in their pursuit for resolution of their conflicts are *private costs*<sup>11</sup>. Private costs of the path to justice are incurred by the individuals who travel on the paths to justice<sup>12</sup>.

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<sup>11</sup> RICHARD A. POSNER, *Economic Analysis of Law* (Wolters Kluwer Seventh Edition ed. 2007); LISA BERNSTEIN *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 *University of Pennsylvania Law Review* 2169, (1993); (2009) *J. JURIS* 116

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The measurement framework will focus on the private costs of justice. Access to justice may depend on the means of the individuals to pay the private costs of the paths to justice. The decision to enter a path to justice is strongly connected with the boundedly rational assessment of costs, given the perceived probability of success and the expected outcomes. Social costs of justice processes are not usually part of this decision. I assume that when individuals weigh in the costs and the expected benefits of the justice processes, they do not include the social costs in the equation. The assumption could be relaxed, though, in specific paths to justice.

### **3. COSTS AS BARRIERS TO JUSTICE**

Access to justice has been unequally distributed across socio-economic status, social class, level of education, geographic location, gender and many other dividing criteria. Demand for justice greatly exceeds its supply, and many disputes remain unresolved in the shadow of this imbalance. Those with more resources receive a larger and faster share of justice than individuals or legal entities with fewer resources. The very fact that justice could be unequally distributed is running against the fundamental principles of equal access, equality of arms and a fair trial. What causes the imbalance is primarily an uneven access to justice. There are numerous barriers that prevent people with justice needs from solving their problems through the official and unofficial justice processes. A prolific body of research addresses the substance, proliferation, cause and effects of the barriers to justice. Although there is no common definition of what a barrier to justice is, the term has been used as a synonym for one or more causes of inaccessibility.

In the next sections I review the most often studied barriers to justice as they are defined in the literature and analyze the associated private costs. The goal is to extract the different instance of the costs of paths to justice from the barriers. Some barriers are expected to coincide with the required resources, while others will be the causing factor of one or more types of costs. I call the former simple and the latter complex barriers. After analyzing both types of barriers, a list with the costs of paths to justice is derived. Using this list, taxonomy of the costs of the paths to justice will be developed.

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STEVEN SHAVELL, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 *International Review of Law and Economics* 99, (1999).

<sup>12</sup> COHEN, *Measuring the costs and benefits of crime and justice*; HENRICK J. HARWOOD, et al., *The economic costs of alcohol and drug abuse in the United States*, 1992. (1998), available at <http://www.drugabuse.gov/EconomicCosts/Index.html>.

The estimation of the barriers to justice is hardly an exact science. Some barriers are specific for a certain legal problem or a particular social group, others are less contextual. The magnitude and the impact of the barriers are relative to the means of the particular users of justice. What is an insurmountable obstacle for one individual could be a nuisance for another. The general theory of the barriers to access to justice is that the have-nots overcome fewer barriers and receive less justice than the haves<sup>13</sup>. Though, the relationship between means and access is not that simple<sup>14</sup>. Examples from the publicly funded legal aid schemes from many countries reveal the well-known middle-income trap. Despite the non-linearity, the barriers of access to justice affect those people with limited resources more strongly.

A possible approach to constructing a framework of the costs of justice is to look at the barriers and translate them into costs of justice. Some of the barriers identified in literature are costs directly incurred by the users. Filing fees and legal fees are barriers, which could be directly expressed as costs of justice. However, not all barriers to justice are private costs. Some barrier-cost relationships take the form of cause and effect. For instance, the delay of justice is a barrier – many non-trivial legal problems are lumped because of the perception that dispute-resolution takes a disproportionate amount of time. Is this delay a cost of justice? According to the definition outlined above, it is not<sup>15</sup>. In general, a user cannot directly invest more resources in order to decrease the duration of a path to justice. The delay on a path to justice, however, causes additional costs. If the path to justice was shorter, the user would not need to spend additional resources. From this perspective, the barrier to justice can be seen as property of the path, which increases the actual or perceived costs of justice. Apart from the delay, other examples of barriers that cause costs could be a lack of information, legal uncertainty, and inefficient procedures. These barriers hinder access to justice but are not private costs of justice. However, they could often be reliable proxies for the host of costs that are caused by them.

### 3.1. Information barriers

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<sup>13</sup> MARC GALANTER, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law and Society Review* 165, (1974).

<sup>14</sup> HERBERT M. KRITZER, *To Lawyer or Not to Lawyer, Is That the Question?*, 5 *Journal of Empirical Legal Studies* 875, (2007).

<sup>15</sup> Unless the path to justice could be accelerated at the price of additional cost. In this case, the additional costs will be the cost of avoiding delay.

At the beginning of a path to justice, a person must realize that the problem can be solved by legal means. A dispute with a service provider (such as a car mechanic) over the quality or price of the service is a problem, but its solutions would often not be seen as legal<sup>16</sup>. After all, car owners frequently argue with car mechanics, but rarely sue them. Even if a particular problem has been subjectively defined as legal, the individual may not know the required steps to solve it. In both cases, there is an informational barrier to justice. In order to make decisions, the users of justice need information regarding possible alternatives on their paths. Indeed, people ‘satisfice’ in order to overcome the shortage of information. Still, on many paths to justice, particular investments must be made in order to bridge the information gap<sup>17</sup>.

If we employ the path to justice paradigm, the cost of information will mean that the particular process requires an investment in order to be accessed. Silver<sup>18</sup> defines the costs of information as *pre-filing* costs.<sup>19</sup> Unlike the *post-filing* costs, these are compulsory expenditures at the time when the procedure is about to start. Therefore, acquisition of information could be a significant barrier for access to justice. In order to overcome the barrier, a person with justice needs to make different sorts of expenses, which, in this paper, are conceptualized as costs of the path to justice. Hence, the information barrier causes private costs that the users of justice incur.

Information is a scarce resource, having a price tag that could be procured from the market. To a certain extent, the legal services market could be perceived as a market of exchange of information against a price. Since information has a price, the need for information causes additional costs. The information could be purchased with different currencies. Providers of legal services charge fees, denominated in money. In addition, finding the needed information could consume a certain amount of time, which otherwise could have been alternatively used. Information could also be obtained from the social network. In the latter case, the cost of receiving information can be expressed as the exhaustion of the particular relationship. If there had not been a need for asking for information regarding the path to justice, the relationship may have been productive in some another fashion.

### 3.2. Monetary outlays

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<sup>16</sup> JON T. JOHNSEN, *Legal Needs Studies in a Market Context*, in *The Transformation of Legal Aid*, (Francis Reagan, et al. eds., 1999).

<sup>17</sup> HERBERT ALEXANDER SIMON, *Models of Bounded Rationality* (MIT Press 1982).

<sup>18</sup> SILVER at 2082

<sup>19</sup> Costs incurred by the party before a formal legal action has been instituted.

Once the problem is recognized as legal, the user of justice might face numerous other barriers. Because the barrier coincides with the costs paid by the users, the need to pay money is the most tangible barrier on the paths to justice. Legal fees, filing fees, fees for expert witnesses are only a few examples of the numerous out-of-pocket expenses. Most of the existing research on costs of justice is focused on monetary expenses related to solving legal problems through litigation or some other form of dispute resolution<sup>20</sup>. The concentration of both research and policy measures on the out-of-pocket expenses is understandable. Estimation of the monetary expenses is more straightforward and requires fewer assumptions compared to the costs of justice, which are expressed in different units such as time, lost opportunities or stress. Hence, the difficulties with defining and measuring the costs, which are not paid in money, could lead to the misleading conclusion that the out-of-pocket costs of justice are the single most significant barrier to justice.

In the following paragraphs I briefly review the existing empirical research on the out-of-pocket costs. The goal of the analysis is to summarize the major findings on the significance of the monetary outlays as a barrier to justice. The literature will also suggest particular examples of out-of-pocket expenditures on different paths to justice. These expenditures can be directly measured as costs. Unlike the information or delay barriers, the monetary costs are not the causing factor, but rather the effect of these factors. As such, the out-of-pocket costs are direct costs of the path to justice.

In a large scale research on civil litigation in the US, Kritzer, Sarat et al.<sup>21</sup> collected data from over 3.000 court and alternative dispute resolution civil cases and conducted more than 10.000 interviews with lawyers, disputants, and potential disputants in the U.S. In terms of the costs of litigation, the researchers claim that the attorneys' fees "constitute virtually the entire out-of-pocket costs"<sup>22</sup>. The payments to lawyers in the studied cases accounted for 99% of out-of-pocket expenses for individual litigants and 98% for corporate litigants. When one factors in the value of the disputant's time (or the value of

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<sup>20</sup> WARREN K. WINKLER, *Civil Justice Reform - The Toronto Experience*, 39 *Ottawa Law Review* 99, (2008); FAISAL BHABHA, *Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions*, 33 *Queen's Law Journal* 139, (2007); GARY CHAN KOK YEW, *Access to Justice for the Poor: The Singapore Judiciary at Work*, 17 *Pacific Rim Law and Policy Journal* 595, (2008); see 15 national reports on costs and delay of civil litigation in ADRIAN ZUCKERMAN, *Assessment of Cost and Delay - a Multi-National - Perspective* (University of Wien 1999); HERBERT M. KRITZER, *The Civil Litigation Research Project: Lessons from Studying the Civil Justice System*, in *Proceedings of the Second Workshop on Law and Justice Statistics*, (Alan E. Gelfand ed., 1983).

<sup>21</sup> HERBERT M. KRITZER, et al., *Understanding the Costs of Litigation: The Case of the Hourly Fee Lawyer*, Summer 1984 *American Bar Foundation Research Journal* 559, (1984).

<sup>22</sup> *Id.* at 561.

employee time for organizational litigants), the lawyer's fee represents about 80% of the total cost in the typical (median) case. The predominance of lawyers' fees in total litigation costs is reflected in other empirical studies on private cost of disputing<sup>23</sup>. In a research on cost of arbitration claimants, Zuckerman<sup>24</sup> finds that more than half of the costs of arbitration are spent on lawyers' fees.

In some studies, the lawyers' expenses are categorized as part of the total cost of civil litigation<sup>25</sup>. Using a cross-sectional design, the researchers make inferences about the total cost of litigation. They are based on law firms' accounts of incurred costs in a sample of civil cases where one of the parties was represented by a law firm. Analytically, the litigation costs are broken down into two categories: professional inputs and non-legal inputs. The "professional inputs" category consists of lawyers' fees, and is further broken into five levels according to the seniority of the fee earner. In the other category of non-legal inputs (or disbursements), the authors combine fees for barristers, expert witnesses "and other disbursements"<sup>26</sup>. It is clear that professional input and non-legal input categories somewhat overlap. From the perspective of the litigant who pays the expenses, the barristers' fees should be conceived as a professional input. The authors of the study adopt the perspective of the law firm, which is regarded as a disbursement.

Hersch and Viscusi<sup>27</sup> use the total defense expenses concept<sup>27</sup> to study the tort liability litigation costs borne by defenders (primary insurers) in insurance cases. The total cost of defense is measured through aggregation of three sub-categories of costs: outside defense counsel, allocated expenses for in-house defense counsel and allocated loss adjustment expenses. As the authors suggest, the last category could accommodate a broad array of expenses incurred by the insurers including court fees, stenographers, etc. In fact, the expenses for outside and in-house defense counsel are variations within the broader category of attorneys' fees. Hersch and Viscusi<sup>28</sup> recognize the value of time spent by the claimant, but do not measure it.

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<sup>23</sup> JAMES S. KAKALIK, et al., *An Evaluation of Mediation in Early Neutral Evaluation Under Civil Justice Reform Act* (RAND, 1996).

<sup>24</sup> SUSAN ZUCKERMAN, *Comparing Cost in Construction Arbitration & Litigation*, 42 *Dispute Resolution Journal* 42, (2007).

<sup>25</sup> WILLIAMS & WILLIAMS at 75; ZUCKERMAN, *Comparing Cost in Construction Arbitration & Litigation* at 44.

<sup>26</sup> WILLIAMS & WILLIAMS at 75.

<sup>27</sup> JONI HERSCH & KIP VISCUSI, *Tort Liability Litigation Costs for Commercial Claims*, 9 *American Law and Economics Review* 330, (2007).

<sup>28</sup> *Id.* at 358.

Genn<sup>29</sup> surveys a random sample of adults living in England and Wales in order to study the occurrence of and response to justiciable events. Genn splits the costs of paths to justice in two categories – legal costs and other costs. She reports that among those who incurred legal costs and paid themselves, the median amount paid was £198 (mean £829). Surprisingly, 84% of the respondents who have incurred legal costs were not worried at any stage about the costs. Some 60% of the respondents who reported a justiciable event incurred other legal costs (i.e. telephone calls, travelling costs, loss of earnings). However, the responses suggest that the other costs are not really burdening – the median amount is below £10.

In research on justiciable events in Scotland, Genn and Paterson<sup>30</sup> found that respondents who experienced a justiciable problem, but did not seek advice, reported a fear of legal costs as one of the most important factors influencing their decisions not to seek professional advice. Rather, they chose to solve the matter themselves. Research from New Zealand<sup>31</sup> reports 27% of respondents with legal problems and 35% with legal needs claimed that lawyer costs prevented them from obtaining help. Genn and Paterson<sup>32</sup> draw a similar conclusion: “respondents to survey interviews and qualitative interviews expressed a pervasive feeling that obtaining legal advice was hugely expensive and that for many kinds of problems obtaining such advice was simply not an option”.

Apart from the legal fees, the justice processes require numerous other instances of out-of-pocket costs. Depending on the procedure, their proportion to the total cost of the path to justice could vary significantly. Some of the possible monetary costs of paths to justice are court, arbitration and mediation fees, jury fees, services of summons, exhibit fees, an appeal bond, court reporter fees for the trial transcript, fees for abstracting the judgment, and discovery related costs<sup>33</sup>. Monetary outlays, which are high in absolute

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<sup>29</sup> HAZEL GENN, *Paths to Justice. What people do and think about going to law?* (Hart Publishing, 1999).

<sup>30</sup> HAZEL GENN & ALAN PATERSON, *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law* (Hart Publishing, 2001).

<sup>31</sup> IGNITE RESEARCH, *2006 National Survey of Unmet Legal Needs and Access to Services*. (2006), available at [http://www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccessToServices\\_001.pdf](http://www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccessToServices_001.pdf).

<sup>32</sup> GENN & PATERSON, *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law* at 98.

<sup>33</sup> JAMES P. GEORGE, *Access to justice, costs and legal aid*, 54 *American Journal of Comparative Law* 293, (2006).

value or disproportionate to the protected interest, certainly have a negative influence over the accessibility of the path to justice.

A corrupt judiciary could increase or distort the cost of justice in many different ways. Unofficial payments add to the out-of-pocket costs of the path to justice. Corruption also increases the uncertainty of the procedure and its outcomes. The indigent, illiterate, or those with lower education are particularly vulnerable to be exhorted for irregular payments. This form of corruption is not only compromising the integrity of the justice processes, but also challenges the accessibility of the affected paths .

### 3.3. Time spent

Effective redress of justice needs takes time. The time component of the paths to justice is one of its most significant barriers. As in the case of the monetary costs, the time spent is a very tangible barrier because it relates directly to expenditures, incurred by the users of justice. Most of the existing research places the emphasis on the delays inherent for litigation and other modes of dispute resolution<sup>34</sup>. The amount of time that the users of justice spend on the justice procedures has been largely understudied. People spend time on collecting information, contacting professionals, travelling, awaiting hearings or waiting in queues, as well as many other time-consuming activities. Time is a valuable resource and has a price, which in turn is dependent on many objective and subjective variables. Some procedures require more time than others, and some users of justice are more vulnerable to time lost. For instance, repeat players are believed to spend less time than “one-shotters”<sup>35</sup>. Better informed users of justice will be more likely to optimize their time compared to users of justice who possess less information. The value of time itself is a matter of highly subjective assessment. In general, it could be hypothesized that people with higher earnings will place a higher value on time compared to those users whose time is less valuable.

Similar to the out-of-pocket expenses, time is both a barrier and cost of justice. Other barriers, such as lack of information or ineffective models of delivery of justice, require the users to spend time on the paths to justice. What the user has to ‘pay’ in order to travel to the end of a path to justice is a certain amount

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<sup>34</sup> WINKLER at 100; ZUCKERMAN, *Comparing Cost in Construction Arbitration & Litigation*; SERGIO CHIARLONI, *A Comparative Perspective on the Crisis of Civil Justice and on its Possible Remedies* (University of Wien 1999); ALLAN E. LIND, et al., *The Perception of Justice. Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (The Institute for Civil Justice ed., The Rand Corporation. 1989).

<sup>35</sup> Galanter at 168.

of hours, days, months or even years. From the perspective of the user of justice, this amount of time spent is a cost.

### **3.4. Delay of dispute resolution**

Delays of dispute resolution processes are one of the most touted problems of contemporary justice systems. Often, the resolution of claims takes such a long time that it is considered a barrier to justice. The delay of dispute resolution relates to the concept of time, but does not coincide with the time spent on the procedure. Rather, delay is a causal factor for expenses including personal time, money and stress. It is possible that a process is not delayed, but the user is still required to make significant investments from her personal time. Rarely, the opposite is true – although the process proceeds for too long, the amount of personal time is not affected.

The delay of the legal procedures causes numerous types of losses. The ongoing dispute, and the intricacies of official and unofficial dispute resolution procedures, could make the user feel an excessive amount of stress and negative emotions. A dispute concerning real estate could thwart the chances of the litigating owner to use a resource in its most effective way. Meanwhile, a prolonged dispute over parental control will damage the relationship between a child and at least one of his or her parents. There are countless examples of how the delays on paths to justice can negatively affect the people who rely on these procedures to solve their legal problems.

Could the consequences of delays be contemplated as costs? If we take, as an alternative, an instant dispute resolution process, the effects of the delay will be framed as losses (explicit costs). The negative value of the delay is the difference between the utility of a timely outcome and the utility of a delayed outcome. This difference will be reflected in the subjective assessment of the quality of the outcome. A timely outcome will better address the need for justice compared to a delayed outcome<sup>36</sup>. Our general methodological framework simultaneously measures the costs of the path to justice and the perceived quality of the outcome. Therefore, one possible approach to account for the cost of delays will be to measure it as a property of the outcome. An alternative strategy would be to use the methods suggested for valuation of time and foregone earnings.

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<sup>36</sup> MAURITS BARENDRECHT, et al., How to Measure the Price and Quality of Access to Justice? available at <http://ssrn.com/paper=949209>.

The delays of paths to justice cause damages and missed opportunities for the users of justice<sup>37</sup>. A prolonged path to justice will require more out-of-pocket expenses for legal fees, travel, etc. Also, a delayed procedure will likely increase the amount of time spent and will cause additional opportunity costs such as foregone earnings and opportunities. Stress, emotions and damage, secondary victimization, and damage to relationships are other categories of costs which could be triggered by a delay in the procedure. Similar to the information barrier, delays are the causing or contributing factors of virtually all types of direct costs of justice. Delays in the disposition of cases epitomize ineffective and inefficient legal systems and processes. Many problems with potential legal solutions are not acted upon because of time concerns and the related uncertainty.

### 3.5. Uncertainty of the costs

On a path to justice, some costs, such as court fees or administrative fees, are fixed. Normally these make up a small fraction of the total costs. Most of the remaining costs of paths to justice are variables – they vary as the conditions change. The time spent on the procedure or the amount of the legal fees will depend on the duration and complexity of the path to justice. This means that the user of justice can predict the size and the structure of the variable costs only within broad intervals. The wider the intervals' bounds, the more uncertain the costs of the procedure are. Most individual users of justice are “one-shotters” and have only limited information on the frequencies or likelihoods of the varying costs of justice<sup>38</sup>. Uncertainty of costs is a specific barrier for those with limited resources. As Kahneman and Tversky<sup>39</sup> assert, the individuals are more willing to reduce the risks of losing than to maximize opportunities for winning. Following the prospect theory, we could expect that, individuals will be less willing to act to protect their legal rights and interests when costs of justice processes are uncertain.

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<sup>37</sup> MILLER, et al., Costs of Juvenile Violence: Policy Implications; PAULA DOLAN, et al., Estimating the intangible victim costs of violent crime, 45 *British Journal of Criminology* 958, (2005); MARC GALANTER, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 *Journal of Empirical Legal Studies* 459, (2004); PAULA DOLAN & TESSA PEASGOOD, Estimating the Economic and Social Costs of Crime, 47 *British Journal of Criminology* 121, (2007).

<sup>38</sup> YEW at 600; BRENDAN EDGEWORTH, Access to Justice in Courts and Tribunals Compared - Residential Tenancy Disputes in Sydney (1971-2004), 27 *Civil Justice Quarterly* 179, (2008).

<sup>39</sup> DANIEL KAHNEMAN & AMOS TVERSKY, *Prospect Theory. An Analysis of Decision under Risk, in* Choices, Values and Frames, (Daniel Kahneman & Amos Tversky eds., 2000).

The uncertainty of the costs is only one dimension of the uncertainty of the paths to justice. Other questions include how long will the quests for justice last, will the procedure meet its expectations or will the outcome solve the problem? Most users of justice address these questions in one form or another because they are uncertain about the path to justice. If all the important aspects of the procedure were predictable, then the uncertainty would be regarded as low. In the real world, however, the paths to justice are largely uncertain. One path could be uncertain in terms of its duration, while another could be perceived by the users as producing random, and therefore unfair, outcomes. A user of the third path could worry if he will be the lucky one, treated with respect and politeness during the procedure. Yet, many paths to justice reveal multiple and intermingled uncertainties, which operate as barriers to justice.

The uncertainty is a complex barrier to justice and often will be impossible to disentangle from the information barrier. Many problems with potential legal resolution are lumped in the uncertainty of the inherent out-of-pocket, time or stress costs. Uncertainty itself is a barrier, but not a cost. However, it could trigger numerous types of costs. The user who is uncertain about the procedure or the outcome will be more likely to pay legal fees even if she can effectively achieve the result without spending the money. Faced with procedural uncertainty, the person who needs justice will probably spend more time to collect and process information. All these costs can be perceived as a strategy to reduce the risks stemming from uncertainty.

### 3.6. Inefficient delivery of justice

Geographical remoteness of justice providers, complicated procedures, and the obstruction in the physical environment are all tangible barriers to justice. People who have to travel significant distances will be more likely to leave legal problems unresolved. Disabled people or people with mental illnesses often find it difficult to reach courtrooms or offices of public authorities<sup>40</sup>. In a study of access to justice for disadvantaged communities in Australia, Mulherin and Coumarelos<sup>41</sup> found that long delays on phone calls, delays in getting a response and difficulties with getting an appointment are the most pressing barriers for receiving legal advice. Djankov, La Porta et al.<sup>42</sup> conceptualize the

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<sup>40</sup> MARIA KARRAS, et al., On the edge of justice: the legal needs of people with a mental illness in NSW available at <http://www.lawfoundation.net.au/report/mental>.

<sup>41</sup> GEOFF MULHERIN & CHRISTINE COUMARELOS, *Access to Justice and Disadvantaged Communities*, in *Transforming Lives: Law and Social Process*, (Pascoe Pleasence, et al. eds., 2007).

<sup>42</sup> SIMEON DJANKOV, et al., *Courts*, 118 *Quarterly Journal of Economics* 453, (2003).  
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number of procedural steps as a barrier to justice. They measure two court procedures (eviction of a tenant for not paying rent and the collection of bounced checks) in order to build an index of procedural formalism. More procedural steps to solve the problem are seen as a form of inefficiency, making access to justice more expensive and, thus, limited. In a related project, the World Bank<sup>43</sup> measures the ease of doing business at a national level through assessing the number of procedural steps and the duration of each step. Again, the underlying logic is that access to justice is obscured by the increased number of procedural steps and prolonged duration of the individual steps.

Inefficiencies in delivery methods of justice processes could stop many people from pursuing justice. The inefficiencies of the provision of justice can be considered as complex barriers to justice. These barriers require the users of justice to make different sorts of expenditures - out-of-pocket expenses, lost time, increased stress, etc.

### **3.7. Stress and emotions**

Stress and emotions are other examples of under researched barriers to justice. For victims of crime, access to justice could be significantly compromised by the expected high degree of stress and negative emotions. As a result of the institutionalized response to the act of crime, the victims could experience secondary victimization in many different forms. Feelings of rage and helplessness, fears for the personal safety and loss of security and trust are a few examples of the negative forms of secondary victimization. Similar concerns could compromise access to justice in civil and administrative matters.

Pleasence, Balmer et al.<sup>44</sup> study the incidence of adverse consequences of justiciable problems in England and Wales. Stress related ill health, the break down of a relationship, physical assault and property damage, loss of income and failing confidence are the most frequently occurring negative effects from the experienced justiciable problems. In this study, the researchers investigated the consequences of the problems and did not try to isolate the additive effect of the procedure. Genn and Paterson report that one third of those who carried out paid work reported that there had been a negative impact on their work life, including taking time off as a result of stress or suffered relationships

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<sup>43</sup> See <http://www.doingbusiness.org>

<sup>44</sup> PASCOE PLEASENCE, et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in *Transforming Lives: Law and Social Process*, (Pascoe Pleasence, et al. eds., 2007).

with colleagues. “On the negative side almost three-quarters of those reporting some impact said that they found the experience of trying to sort out the problem stressful”<sup>45</sup>.

If the focus is on stress and emotions which are caused on paths to justice, we can perceive stress and emotions as specific costs of justice. Indeed, these do not have natural units of measurement and the valuation is highly subjective. The amount of stress and emotions also tends to vary as time goes on. However, travelling a path to justice could require a significant expenditure of stress and emotions from the users of justice. Therefore, stress and emotions will be viewed as direct costs of the paths to justice.

### **3.8. Secondary victimisation**

Montada defines secondary victimisation as “...violations of rights and entitlements which victims claim after having been victimized...”<sup>46</sup>. Instead of receiving just resolution to their problems, the victims of crime often experience additional psychological harm on their paths to justice. In contrast to the primary victimisation, this time the damage could be caused by legitimate processes which are intended to provide justice. The amount of expected psychological harm on a path to justice is a significant barrier to access to justice for many victims of crime .

Secondary victimisation is not only limited to criminal justice. Similar concepts could be found in studies on the civil justice system . A victim of tort is likely to suffer process related psychological harms similar to those experienced by a victim of crime.

### **3.9. Social costs and damage to relationships**

Michelson discusses the category of social costs as a specific barrier to justice. Here, “social cost” is used with a different meaning from the standard understanding of social cost in the dichotomy of private-social costs. Social costs in Michelson’s understanding are the consequences of the conflict and the related procedure, which could negatively affect the position of the user of justice in her social group or community.

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<sup>45</sup> GENN & PATERSON, *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law.*

<sup>46</sup> LEO MONTADA, *Injustice in harm and loss*, 7 *Social Justice Research* 5, (1994).  
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Similar to social costs (in its narrow meaning) is the cost of broken or damaged relationships, degrading status and ex-communication. For instance, for a victim of domestic violence, the cost of the dispute resolution will be augmented by the expected further deterioration in her relationship. Pleasence, Buck et al.<sup>47</sup> and Coumarelos, Wei et al.<sup>48</sup> find in England, Wales and Australia that stress and sparing damage to relationships were much more serious concerns for not responding to justiciable problems than financial barriers. As in the case of stress and emotions, these costs are subjective and difficult to measure. The fact that certain cost categories elude observation and measurement does not mean that it is not negatively impacting the access to justice.

### **3.10. Language barrier and legal language**

The language of the procedure could be a barrier to justice if a particular person is not fluent in this language<sup>49</sup>. The user of justice who has a need for justice but does not understand the language may incur additional expenses for interpreters or translation of documents. Therefore, the language barrier could cause costs that would not have been necessary.

The complex legal language could be considered somewhat similar to the language barrier. Formalistic procedures and incomprehensible legal language could be intimidating. Again, the users of justice might be forced to spend additional funds in order to overcome this barrier, with hiring a lawyer as the most likely response.

### **3.11. Other barriers to justice**

There are other barriers to justice, which are particularly difficult to measure and value. For instance, feelings of powerlessness<sup>50</sup>, fear<sup>51</sup>, unwillingness to

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<sup>47</sup> PASCOE PLEASENCE, et al., *Causes of Action: Civil Law and Social Justice* (Stationery Office. 2004).

<sup>48</sup> CHRISTINE COUMARELOS, et al., *Justice made to measure : NSW legal needs survey in disadvantaged areas* (Law and Justice Foundation of New South Wales. 2006).

<sup>49</sup> NICHOLAS P. TSUKAMAKI, *Legislative Inconsistency: California's Good Cause Statutory Exceptions As a Step Back in the Effort to Improve Court Access for Non-English Speaking Civil Litigants*, 41 *University of San Francisco Law Review* 69, (2006).

<sup>50</sup> REBECCA L. SANDEFUR, *Access to Civil Justice and Race, Class and Gender Inequality*, *Annual Review of Sociology* 339, (2008).

<sup>51</sup> VICTORIA GAVITO, *The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants' Rights*, 14 *Human Rights Brief* 5, (2007).

complicate the matter further<sup>52</sup>, distrust in or lack of credibility of the justice system<sup>53</sup> or cultural barriers<sup>54</sup> could effectively obstruct access to justice. However, it is empirically difficult, if not impossible, to estimate what the cost would be for an individual to overcome such abstract barriers. How much, for instance, will it cost a user of justice to overcome her distrust in a particular procedure? Both conceptually and methodologically it will be difficult to find an answer to this question. Costs of justice, which are a challenge to measure, should be recognized and assessed through appropriate proxy indicators.

### 3.12. Summary and classification

The review of the research on barriers to justice suggests a significant variety of obstructions and costs on the paths to justice. In order to facilitate the coherent measurement and interpretation, I map the costs in a framework. Several classification schemes could be used to categorize the costs of justice into more abstract categories. Levine<sup>55</sup> breaks down the costs of conflict resolution into four categories: direct cost, productivity cost, continuity cost and emotional cost. Direct cost and productivity cost correspond to the Kritzer, Sarat et al.<sup>56</sup> out-of-pocket and opportunity cost categories. Under continuity cost, Levine understands “costs [that] accrue when productive relationships are changed”<sup>57</sup>. Defined like this, the continuity costs overlap with the costs of the foregone earnings and the damage to relationships cost. In the context of analyzing the costs of ADR, Levine considers emotional costs as a significant barrier, but warns that “a price tag can't be placed on these emotional losses” .

Some authors use a similar classification of economic and non-economic costs<sup>58</sup>. The differentiation criteria here will be the availability of markets for a specific resource. If applied to my classification, the monetary and opportunity

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<sup>52</sup> GENN & PATERSON, *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law*;IGNITE RESEARCH.

<sup>53</sup> MARC GALANTER & JAYANTH K. KRISHNAN, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 *Hastings Law Journal* 789, (2004).

<sup>54</sup> ETAN MICHELSON, *The Practice Of Law As An Obstacle To Justice: Chinese Lawyers At Work*, 40 *Law and Society Review* 1, (2006).

<sup>55</sup> STEWART LEVINE, *Breaking Down Costs: What You are Losing by Not Using ADR*, 19 *Alternatives* 235, (2001).

<sup>56</sup> KRITZER, et al., *Understanding the Costs of Litigation: The Case of the Hourly Fee Lawyer*.

<sup>57</sup> LEVINE at 248.

<sup>58</sup> GREGORY B. RODGERS, *Estimating Jury Compensation for Pain and Suffering in Product Liability Cases Involving Nonfatal Personal Injury*, 6 *Journal of Forensic Economics* 251, (1993).

costs of the paths to justice should be regarded as economic costs. On the other hand, the intangible costs from the developed framework will be defined as non-economic costs.

An alternative classification approach uses the chronological progress on paths to justice as criteria. Employing the criteria of formal initiation of a legal claim, the costs could be split up in pre-filing and post-filing costs<sup>59</sup>. Another use of the chronological criteria is the classification by procedural stages. There is one significant disadvantage of the chronological mapping of the costs of justice: the criterion is not applicable to the informal justice processes in which there are no discrete moments of filing a claim and no distinguishable procedural phases.

Above, I discussed that some costs of a path to justice are compulsory and others are optional. Court or arbitration fees and costs for travel for hearings are examples of necessary costs, without which many processes would not start. On the other hand, legal fees are optional costs in most procedures. There are serious challenges that require this particular criterion to be abandoned. First, the variation in the paths to justice blurs the distinction between compulsory and optional costs. Second, within a path to justice, the decision of whether a cost is compulsory or optional could be highly subjective and vary with the characteristics of the parties or the properties of the procedure.

Three milestones guide the selection of criteria for classifying individual costs into larger groups. First, it is intended to assist the process of identification and measurement of costs that reduce access to justice. The second goal of the framework is to estimate the costs from the perspective of the users of justice. The third criterion determines the level of measurability of the cost of certain items. The role of the cost as a barrier to justice and the type of the expenditure, as well as the measurability of the cost, will be used as criteria for structuring the cost framework. From the users' perspective, the distinction will be of little significance if the resource has been spent to pay court fees or purchase tickets to travel to the courtroom. Both of these costs will be manifested as out-of-pocket expenses for the user. A common characteristic of these costs is that they are paid with money, have a common measurement and are easily comparable. People tend to associate costs with monetary costs and generally memorize these expenses more easily. Simply put, the out-of-pocket expenses do not require significant cognitive efforts to be estimated and calculated. Therefore, the monetary outlays are significantly easier to measure. In comparison, the value of time lost is an abstract concept, and only a small

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<sup>59</sup> Silver at 2082.

number of professionals could readily calculate the value of 3 hours, for example, lost on a path to justice. The relative feasibility of measurement and the prevalence of monetary costs in certain types of procedures (i.e. litigation and arbitration) give ground to many researchers to use these costs as a sufficient proxy to the total costs of the paths to justice.

As was discussed above, there are multiple instances of costs of justice, which are not expressed in money. Time, stress, inefficient modes of delivery, broken relationships and emotions do not use money as measurement units. People either do not measure such expenses on any replicable scale, or use units such as hours or days. In both cases, it is very difficult to account for these expenses. What is common, however, is that these costs of paths to justice belong to the category of non-monetary costs.

The non-monetary cost category is the opposite of the monetary costs of justice. Within this category, however, there are costs with marked differences. We can see that some non-monetary costs of the paths to justice are easier to express in money. For instance, the time lost and the depreciation of resources due to a pending procedure could be translated in monetary terms. There are markets for time and for goods, which could inform us of the alternative uses of these resources. The concept of opportunity costs and the *second best use of time and resources* will be discussed in more detail below. In the second cost category, I refer all costs of paths to justice, which are not expressed in money, to markets that provide information on the shadow price of the resource. I will term this second category of costs of paths to justice as opportunity costs. Within this category, two types of costs will be distinguished – lost time and foregone earnings.

The costs from the third category could not be expressed in money, and there are no markets for this particular type of resource. Emotions, anxiety, stress, social connections and broken or damaged relationships frequently accompany the outcomes of paths to justice. However, as many researchers warn, it is more difficult and sometimes impossible to translate these costs into money. A monetary value of the intangible costs could be derived from shadow prices where such costs exist. In the literature on the costs of crimes, these expenses are often called intangible costs<sup>60</sup>. Miller, Fisher et al.<sup>61</sup> define the out-of-pocket expenses and foregone earnings as *tangible costs*, and pain, suffering and reduced quality of life as examples of *intangible costs*.

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<sup>60</sup> DOLAN, et al., Estimating the intangible victim costs of violent crime; DOLAN & PEASGOOD, Estimating the Economic and Social Costs of Crime.

<sup>61</sup> MILLER, et al., Costs of Juvenile Violence: Policy Implications.  
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An additional challenge related to the measurement of the intangible costs of justice is its difficulty to estimate how much stress is caused by the procedure and how much is attributable to the problem that triggered the procedure. If we look through the eyes of a plaintiff in a medical malpractice case, it will be complicated to find out how much stress is caused by the tort and how much by the following procedure. In general, we can assume that the intangible costs on paths to justice prompted by relational justice needs will be more challenging. I will discuss the issue in more detail below.

It is questionable whether secondary victimisation is a cost or a barrier of justice. As discussed above, it is one of the barriers in accessing both criminal and civil justice. Secondary victimisation could take the form of violation of different rights or legitimate interests of the victims – the right to dignity, right to privacy, right to physical and mental health and other related rights. Victims could be traumatised through experiences of fear, disrespect, humiliating treatment, disbelief, etc. Two cause and effect relationships could be hypothesized here. The first relationship states that the negative aspects of the justice process cause intangible costs in the form of stress and negative emotions. Alternatively, it could be deemed that experiences with stress and emotions lead to secondary victimisation. Since there are no strict definitions of secondary victimisation and intangible costs, it is difficult to test the two hypotheses. Nevertheless, the analysis suggests that secondary victimisation and costs of justice processes are not identical concepts and, thus, should be treated differently.

From these concepts, at least three important implications of the distinction between tangible and intangible costs can be drawn. First is the question of proportions – research on costs of crime shows that intangible costs account for a large share in the overall cost of crimes<sup>62</sup>. The next implication is the challenge of converting intangible costs into standardised units of measurement (e.g. money). Dolan et al.<sup>63</sup> review three approaches used for quantification of intangible costs of justice – revealed and stated preferences, transferring values from other contexts and the calculation of the adjusted quality of life to a monetary value.

The third implication of the classification is the increased uncertainty associated with estimating the category of intangible costs. As Harwood, Fountain et al.<sup>64</sup> suggest, the estimates of intangible costs contain much more uncertainty due to the many latent variables that could contribute to the

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<sup>62</sup> COHEN, Measuring the costs and benefits of crime and justice; RODGERS at 261.

<sup>63</sup> DOLAN, et al., Estimating the intangible victim costs of violent crime.

<sup>64</sup> HARWOOD, et al. at 22

variation. Similar results are reported by Seabury based on research of jury awards in civil cases in the U.S.: “Noneconomic damages also appear to be more variable on average than economic damages..”<sup>65</sup>. Causality is another source of uncertainty, identified in studies of costs of crimes. Although the cause and effect relationship could seem self-evident, in many situations researchers could not be reasonably certain if the crime is the only cause of the expense, or if there is a more complex causality chain.

#### **4. MEASURING THE COSTS OF JUSTICE**

The review of research on barriers to justice implicated by several different perspectives suggests that individual costs of the path to justice can be aggregated into three larger groups. Application of the type of the invested resources and the amenability to measurement as classification criteria resulted in three categories of costs: monetary costs, opportunity costs and intangible costs. However, the division between the three categories is not absolute. Opportunity and intangible costs could also be expressed as a monetary value after additional analysis. Likewise, monetary costs could have a secondary alternative use. In the next chapter I will review the content of the three categories of costs on paths to justice, and will classify the individual cost items. Each category will be linked to the barriers to justice which are assumed to cause them. These categories will then be operationalized into items comprising the measurement instrument.

##### **4.1. OUT-OF-POCKET COSTS**

The costs of legal processes are frequently measured through the proxy of the monetary outlays made throughout the procedure. The monetary costs are easier to quantify and measure, which explains the tendency for placing the focus on them. They are expressed in money, which relieves their measurement, analysis, and comparison from most of the challenges inherent of the non-monetary expenses. Another reason for the extensive attention on monetary costs is the assumption that the out-of-pocket expenses are the most prevalent cost of litigation procedures, which in turn are the most often studied paths to justice. From a methodological perspective, the use of monetary costs as an indicator of the total cost of the process is less challenging with regard to the validity and reliability of the data.

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<sup>65</sup> SETH SEABURY, *Inferring Beliefs from Selected Samples: Evidence from Civil Litigation* 2nd Annual Conference on Empirical Legal Studies Paper available at <http://ssrn.com/paper=998687>.  
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The content of the out-of-pocket costs category largely depends on the specifics of the studied paths to justice. Upon applying the criterion of the type of the expense, I include in the list all costs paid with money. Below is a non-exhaustive list of the likely payments that the users of justice incur on their paths to justice:

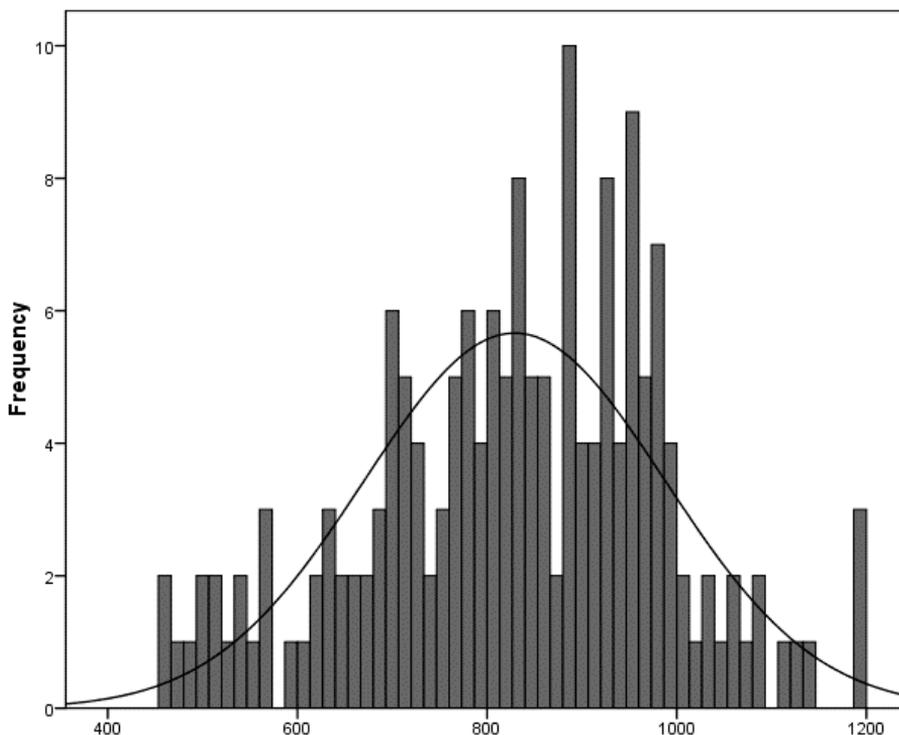
- Costs for use of information (i.e. legal databases, public providers)
- Lawyers'/paralegals' fees;
- Experts' and expert witnesses' fees;
- Filing (court/arbitration/mediation) fees;
- Translator's fees;
- Bailiffs' fees;
- Notary's fees;
- Services for summons;
- Discovery related costs;
- Travel expenses;
- Costs for communication (mailing, calling, etc.);
- Witnesses' compensation;
- Copying and other overheads;
- Bribes and other unofficial payments.

Some of the out-of-pocket costs are fixed costs. For instance, filing fees are usually related to the type of the procedure and/or the value of the claim. In some jurisdictions, the lawyers' fees, expert witnesses and other payments for services of professionals are fixed with statutory provisions. If there is sufficient information on the type of process and the values at stake, most fixed costs of paths to justice could be estimated in advance.

Other components of the out-of-pocket category are variable costs. They can be estimated with different data collection methods. Collection of subjective data about the perceptions and attitudes regarding costs is an appropriate strategy when the research interest centres on private costs of the paths to justice. Content analyses of court files, case files, and other sources of data could be alternative data collection methods for estimation of monetary costs. There are advantages and disadvantages inherent to both estimation strategies. The perception based studies are sensible to ambiguous definitions and numerous threats of the internal validity – memory decay effect, cognitive dissonance, and the on-stage effect, among others. In addition, the collection of data from archival sources will inevitably omit many categories of costs which are normally not documented.

An important matter in measuring the out-of-pocket costs is the issue of the measurement scale. The out-of-pocket costs could be measured with a scale, which reflects the amount of money spent. The practical question here is the level of measurement. Two general options are possible – ordinal or interval scale. With the ordinal scale, the researchers measure the costs against some pre-defined levels. The selection of the levels requires prior information on the measurements of the central tendency of the particular cost elements. For instance, let us assume that we have prior knowledge that the mean out-of-pocket cost of a path to justice is 800 Euros, with a standard deviation of 200 Euros and a normal distribution. In this case, the measurement scale should be influenced by the central limit theorem, which predicts that about 95% of values will lie in the interval of two standard deviations from the mean (400-1200 Euros). Therefore, a measurement scale in which the lowest level is ‘less than 1000’ will provide little information – in the hypothetical scenario graphed in Figure 1 90% of the cases will be aggregated into one category. Official data, previous research or explorative data collection could be used to appropriately tune up the measurement scale.

**Figure 1: Measurement Scale**



Interval level measurement of the out-of-pocket costs of justice is an alternative to the ordinal scale. The users of justice could be asked what exact  
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monetary outlays were made during the path to justice. Although this device could be more appropriate if the respondent is aware of the amount, the interval measurement for many cost categories will only provide a rough estimate. Quantifying an ambiguous expense could embarrass the respondent, increase the measurement error, and lower the response rate.

The out-of-pocket costs are easier to measure in relation to the opportunity costs and intangible costs, but there are challenges involved. The presence of a lawyer, however, could obscure some expenses. In such cases, the user could merge the category of lawyer's fees with other outlays, which the lawyer subsequently makes on his behalf. Mechanisms for identification and addressing such sources of measurement error have to be integral parts of the methodology for measuring the costs of access to justice.

#### 4.2. OPPORTUNITY COSTS

How non-monetary resources spent on paths to justice could be classified into two categories was discussed above. The first group contains the costs for which a meaningful monetary value could be estimated from its second best use. The second category shows all other non-monetary costs of paths to justice that cannot be expressed in monetary terms without subjective transformation. The existence of markets for exchange of the resource will be the major criterion that differentiates the two sub-categories of the non-monetary costs. I will call the first category *opportunity costs* and the second category *intangible cost*. The term *opportunity cost* here is used to narrowly cover the non-monetary costs for which markets exists and the shadow costs for which they could be estimated.

The most vivid example of opportunity cost is the time spent by the user of justice on the procedure. Had the process not consumed the time of the user, she would have been able to earn wages, enjoy recreational activities or utilize the value of her own time in some other manner. The second best alternative of sacrificing the time determines the opportunity costs of the resource. In our example, the shadow price of time could be estimated through observation of the relevant labour markets or through valuation of the price that the same user of justice is willing to pay for recreational activities.

The monetary outlays also have opportunity costs, which could be estimated through analysis of the second best use of the resource. In the framework of costs of paths to justice, I adopt a narrower view on the opportunity cost of monetary expenses. The amount of money spent is a sufficiently good indicator of the private costs of a path to justice. Since the out-of-pocket costs

are expressed in meaningful and comparable units, I will not further investigate their opportunity costs. Estimation of the opportunity costs of the monetary expenses will unnecessarily complicate the measurement of costs of justice.

On a path to justice, one could clearly recognise the pervasive character of opportunity costs. Personal time is the resource that users of justice have to spend on every procedure in order to receive an outcome. A procedure may require many other non-monetary expenses, but these generally belong to the category of opportunity costs. I categorize these costs in the category of foregone earnings, different then personal time, spent on the path to justice. The content of the foregone earnings category will vary from path to path. With the advancement of the analytical and empirical research on the costs of justice, costs from the foregone earnings category will become more transparent and measurable.

#### **4.2.1. Personal time as a cost of justice**

Successful completion of a path to justice requires the user to sacrifice personal time. The amount of time varies significantly by the type of process, value at stake, level of involvement of the user, affordability of legal services, etc. For instance, a pro se litigant will spend significantly more time on a process compared to someone who is represented by a lawyer. In this case, the party represented by a lawyer will spend less time, but will incur larger out-of-pocket expenses. If only the monetary outlays were counted, one could conclude that the process is costly for the latter and inexpensive for the former disputant. This conclusion will not be valid, however, for the amount and value of the time invested by the pro se litigant.

There are two challenges in estimating the time component of a path to justice. First, the total amount of time spent on the procedure by the user of justice has to be estimated. Even for relatively quick paths to justice, the quantification of the time spent could prove to be difficult. The next challenge is the need to translate hours, days, months, or years into standard units, i.e. money.

As in the case with the monetary outlays, the amount of time spent on a path to justice could be inferred either from the users' perceptions or from other sources, which could contain information on time spent. Memory decay, uncertainty, and unwillingness to answer are major challenges for the direct estimation from the users of justice. Official sources and documents will probably omit most of the time expenses, as those expenses will fall in the private domain of the user of justice.

Two strategies that have the potential to improve the reliability of time estimates will be discussed briefly. Each approach requires the collection of prior information on the likely amount of personal time spent on a path to justice. First, the measurement tool could be organized around the development of the procedure. Thus, the users will be better able to reconstruct the event and account chronologically for time spent. Another practical approach for increasing the reliability of the measurement tool would be to organize the time spendings around specific process events. Barendrecht, Mulder et al.<sup>66</sup> suggest examples of possible sources of time spendings on a path to justice:

- Searching for an (legal) adviser;
- Interaction with the other party;
- Consultation (family, friends, etc.), seeking legal advice, deciding on strategy;
- Interaction with authorities;
- Instructing lawyers;
- Collecting evidence;
- Attending hearings;
- Amount of time spent travelling.

After the amount of time spent on a path to justice has been estimated, it must be expressed in money in order to calculate the total cost of the procedure. Time is a scarce resource and has value. The shadow price of time could be measured through an assessment of the net benefits that might be generated from the second best use of time and resources. Estimating the second best alternate use of a given resource requires choices about a range of possible alternatives and the ranking of these alternatives<sup>67</sup>. Choices could be made by the researcher (or policy maker) or inferred from actual behaviour or stated preferences of users of justice. Two approaches are possible in estimating the second best alternative – universal and marginal approach. Under the universal approach, the researcher makes the assumption that certain alternative uses of a resource is the second best – i.e. working for a wage, or the value attached to recreation, is the shadow price of time spent<sup>68</sup>. Another approach has been used by the Dutch Advisory Board on Administrative Burdens<sup>69</sup> in valuing the

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<sup>66</sup> BARENDRECHT, et al., How to Measure the Price and Quality of Access to Justice? at 14.

<sup>67</sup> STEPHEN A. MARGLIN, *The Opportunity Costs of Public Investment*, 77 *The Quarterly Journal of Economics* 274, (1963).

<sup>68</sup> KERRY V. SMITH, et al., The Opportunity Cost of Travel Time in Recreation Demand Models, 59 *Land Economics* 259, (1983).

<sup>69</sup> INTERDEPARTEMENTALE PROJECTDIRECTIE ADMINISTRATIEVE LASTEN, *Meten Is Weten. Handleiding voor het definiëren en meten van administratieve lasten voor het bedrijfsleven* available at [http://www.actal.nl/actal\\_sites/objects/home/handleiding\\_meten\\_is\\_weten.pdf](http://www.actal.nl/actal_sites/objects/home/handleiding_meten_is_weten.pdf).

time that companies lose in administrative procedures<sup>70</sup>. The assumption was made that a uniform value could be attached to time spent on certain activities. In the case of assessing the value of time as an administrative burden to enterprises, the authors suggest that a uniform value-of-time tariff could be defined at an organizational level (see footnote 70). The standard value-of-time approach could be applied at more general levels – professional groups, local communities, or even jurisdictions. These approaches are practically more feasible since they do not require extensive knowledge of the preferences of the particular user. At the same time, insufficient information is the greatest disadvantage of the approach. The applications of a single preference scheme to all users will inevitably result in some wrong classifications.

Several methods could be used to reveal the shadow prices of time. The supply and demand forces on the labour market produce a reliable indication of the value of time. If the user of justice is employed, the value of a lost day in court could be estimated by her regular wage. Problems arise when the labour market is imperfect; the user is not employed, or does not want to reveal her employment. It is possible that for a particular user, the second best use of time is not earning a wage, but resting, recreation, entertainment, or other modes of spending personal time that are not valued in the market. In such cases, revealed or stated preference techniques are more appropriate estimation methods.

An alternative approach for estimating preference functions of the users of justice requires that the researcher reveals the individual preferences of the second best alternative. Presumably, the second approach will lead to a more accurate estimation of the opportunity cost, but at the marginal price of obtaining additional information regarding the individual.

The willingness to pay (WTP) model is often used for estimation of the value of time<sup>71</sup>. WTP is the maximum amount of money or other goods (measured in money) that the users of justice are willing to pay to avoid sacrificing time on a path to justice. For instance, if the procedure has an optional fast track

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<sup>70</sup> The report suggests that the valuation of the time spent should be carried out based on internal and external tariffs. The internal rates are the hourly rate of the employees according to their position. In a hypothetical case study, the report suggests that for a low-level, middle-level and high-level positions the values are respectively €30, €45, and €60. The external tariff is based on the existing information regarding the market value of professional services.

<sup>71</sup> MATTHEW D. ADLER & ERIC A. POSNER, *New foundations of cost-benefit analysis* (Harvard University Press, 2006); CASS R. SUNSTEIN, *Willingness to Pay vs. Welfare*, *Harvard Law & Policy Review* 303, (2007); GREGORY CRESPI, *Valuation in Cost-Benefit Analysis: Choosing Between Offer Prices and Asking Prices as the Appropriate Measure of Willingness to Pay*, 39 *John Marshall Law Review* 429, (2006).

version, the additional cost for the fast track could be seen as the WTP value of the time spent. Another example could be the purchase of legal services, which prevent or reduce the loss of personal time (unrealistically assuming that the legal professional only provides services that relieve the time-burden from their clients). The legal fee in this case could be regarded as the WTP value of the amount of time required for the procedure. The rationale behind this method is that if people attach value to time, they will be willing to pay for it. Different methods exist for estimating the WTP value – i.e. stated preference methods (contingent valuation), revealed preference methods (travel cost method) and examination of market prices.

An alternative model for estimating the value of non-monetary resources is the willingness to accept (WTA)<sup>72</sup>. WTA is the maximum amount of money which a user of justice is willing to sacrifice for the amount of time that a path to justice takes. Compared to WTP, the WTA method usually produces larger values due to the assumed asymmetry between the perceived loss of an item and the gain of the same item<sup>73</sup>.

#### 4.2.2. Foregone earnings

Apart from money and time, justice process could demand numerous other expenses made by the user. Due to ongoing procedures, the user might not be able to work, or might not work as effectively, as the procedure was not running. In addition, a plaintiff who has deposited certain resources will not be able to use them until the procedure is over. A lucrative business opportunity could be missed due to the ongoing procedure. The user's human or social capital could be decreased because of the limitations of the process or uncertainty. For the same reasons, a resource could be devaluated. For instance, a restraining order could limit the owner to exercise his disposition rights. As a result, the owner could suffer losses in the forms of foregone rent, enjoyment of the estate, or access to credit or transfer. There is an infinite number of ways in which a user of justice could suffer losses during the course of a procedure. Looking at these losses from the perspective of the accessibility of the path to justice, they can be classified as barriers. Therefore, expected lost earnings have to be added to the total cost of the process.

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<sup>72</sup> ELIZABETH HOFFMAN & MATTHEW L. SPITZER, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Washington University Law Quarterly 59, (1993).

<sup>73</sup> JOHN K. HOROWITZ & KENNETH E. MCCONNELL, A Review of WTA/WTP Studies available at <http://ssrn.com/paper=257336>; KATHRYN ZEILER & CHARLES R. PLOTT, The Willingness to Pay/Willingness to Accept Gap, the Endowment Effect, Subject Misconceptions and Experimental Procedures for Eliciting Valuations available at <http://ssrn.com/paper=615861>.

The value of lost opportunities will be instituted in our framework as foregone earnings. These costs could be expressed as the value that users of justice give up in order to receive an outcome from a path to justice. In other words, the foregone earnings will be the difference between the actual use of the resource due to the justice process and the earnings from its alternative use.

Unlike the category of time, the foregone earnings cannot be measured in standardised units. The estimation of the foregone earnings requires placement of monetary value on the resource. Similar to lost time, the valuation could be done either through shadow prices or through stated or revealed preferences of the users of justice.

An alternative measurement approach towards the foregone earnings will be to ask the users, “How much did you lose because of the pending procedure?”. The question should clarify that it excludes monetary, time and intangible expenses. A challenge to the reliability of this method will be the difficulties for many users of justice to analytically differentiate between the various costs of justice. Placing a monetary value on the aggregated foregone earnings is highly subjective and susceptible to measurement error. In the contingency valuation method, a case study is used in order to improve the validity and reliability of the stated value of the foregone earnings. In the simultaneous estimation of diverse instances of foregone earnings, a case study method would be impractical. Showing the respondent the most likely instances of foregone earnings could stir her attention in the desired dimension, and help her to place a value on the measured cost of justice.

### **4.3. INTANGIBLE COSTS**

#### **Introduction**

Dolan, Loomes et al.<sup>74</sup> define the intangible costs of crime as the costs “[...] that are much more difficult to measure and quantify”<sup>75</sup>. Pain, emotions, stress, suffering, and the fear of crime are examples of such costs in the context of criminal justice. Other effects of the negative perceptions on paths to justice could be lowered self-esteem, depression or self-degradation. The civil justice systems are similarly cognizant of the category of non-pecuniary damages. Most of the contemporary legal systems provide various remedies for compensation of pain and suffering damages that result from acts of tort or breaches of contract<sup>76</sup>. Depending on the jurisdiction, damage claims could

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<sup>74</sup> DOLAN, et al., Estimating the intangible victim costs of violent crime.

<sup>75</sup> Id. at 958.

<sup>76</sup> MAURO BUSSANI, European tort law : Eastern and Western perspectives (Stämpfli; Sellier, 2007); MARCO LOOS, et al., ECJ, 12 March 2002, Case C-168/00 Leitner v. TUI Deutschland (2009) J. JURIS 142

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ensue from emotional distress, psychiatric disturbance, embarrassment, discomfort, misery and grief, psychiatric shock and loss of enjoyment. What is common of damages in the systems of criminal and civil justice is that the law recognizes the legitimate needs for compensation of non-monetary losses.

Directly borrowing from the studies on the harmful consequences of crimes and torts are inappropriate. Normally, non-monetary losses that result from the problem itself outweigh the comparable process costs. Both criminal and civil problems can have a substantial impact on the personal integrity and health, well-being, property, dignity, and privacy of the affected person. For instance, the stress experienced by a victim of crime, a divorcée or a dismissed worker could easily cause serious psychiatric disorders. In contrast, the stress and emotions suffered on the course of a path to justice will rarely result in a medical condition.

In real life, many intangible costs of justice are difficult to assess and quantify. Even more challenging is clearly distinguishing the negative consequences of the social problems from the process related costs. Very few studies draw this distinction – for instance, Gutheil et al.<sup>77</sup> term the emotional injury from civil litigation as *critogenic* harms. Another aspect hindering measurement efforts is the subjective character of intangible costs. Perceptions of the magnitude of intangible costs of the paths to justice are deeply contextual. Moreover, these perceptions tend to change over time, but the direction and size of change is far from predictable. Faced with this difficulty, most empirical studies on the costs of justice disregard the intangible costs due to their subjective character.

Although difficult, it is not impossible to measure some instances of the intangible costs. What are the intangible costs of the paths to justice? A review of the literature on the barriers to justice suggests several types of intangible costs. In an ideal world, all intangible costs of the path to justice would be measurable. Below, I focus on 3 categories which are assumed to comprise large parts of the intangible costs – stress, emotions, and damage to relationships.

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GmbH & Co. KG Compensation for Non-Material Damage under the Directive on Package Travel, *European Review of Private Law*, (2003); BASIL S. MARKESINIS & HANNES UNBERATH, *The German law of torts : a comparative treatise* (Hart. 2002); HORST ZINNEN, et al., Hoge Raad, Judgment of 22 February 2002 – On compensation for psychiatric injury and emotional distress suffered by close relatives, *European Review of Private Law* 412, (2003).

<sup>77</sup> THOMAS G. GUTHEIL, et al., Preventing "critogenic" harms: minimizing emotional injury from civil litigation, 28 *Journal of Psychiatry Law* 5, (2000).

Apparently, the difference between intangible costs and opportunity costs is slim. In fact, most intangible costs can be expressed as opportunity costs. Stress, pain and suffering could be given a value if there is sufficient information from markets such as insurance and health care. The difference is that for intangible costs the link between the actual loss and its valuation is more indirect. Therefore, the opportunity cost and the intangible cost categories are distinguished on the ground of feasibility of measurement and expression in monetary terms rather than the type of the invested resource. Again, the distinction between intangible costs and foregone earnings is relative and dynamic. With the advancement of respective knowledge domains and the invention of measurement tools, we could reasonably expect that some intangible costs will be re-classified as foregone earnings, or some other sort of cost caused by the delay of the procedure.

Dolan, Loomes et al.<sup>78</sup> review three approaches for valuing the intangible costs of crime – a) stated or revealed preferences; b) adaptation and use of health and personal safety values from other sectors, and c) use of quality adjusted life years valuation instrument. In the criminal proceedings, a significant proportion of the emotional harm is caused during the course of the process. In this context, the intangible costs of the procedure could be even more prevalent and prohibitive from the monetary and opportunity costs. The authors discuss the acute stress disorder, mild post-traumatic stress disorder, and severe post-traumatic stress disorder. Even though a procedure is likely to cause some stress to its user, it is rather unlikely to result in a psychiatric condition such as a posttraumatic stress disorder or depression. However, there are numerous other instances of intangible negative effects, which could be attributed to the process.

### **Stress**

Stress has been measured with objective and subjective scales. Cohen and his co-authors<sup>79</sup> developed and validated the perceived stress scale (PSS) which “measures the degree to which situations in one’s life is appraised as stressful”. A significant limitation of the PSS scale is that it should be applied shortly after the event – the authors recommend a maximum time lapse of one month. As commented elsewhere,<sup>80</sup> identifying and reaching users of particular paths to justice is a challenging task. Often, it will be impossible to collect perceptual data immediately after the outcome was delivered.

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<sup>78</sup> DOLAN, et al., Estimating the intangible victim costs of violent crime.

<sup>79</sup> SHELDON COHEN & GAIL WILLIAMSON, *Perceived stress in a probability sample of the United States*, in *The social psychology of health*, (Shirlynn Spacapan & Stuart Oskamp eds., 1988); SHELDON COHEN, et al., *A Global Measure of Perceived Stress*, 24 *Journal of Health and Social Behavior* 385, (1983).

<sup>80</sup> Gramatikov at 24.

In order to overcome the trade off between validity and reliability, the measurement instrument will use a less sophisticated approach to measuring stress. Respondents are asked to identify the amount of stress on an ordinal scale. A disadvantage of the approach is that the stress is measured as a flat concept and, inevitably, the validity will be compromised. On the other hand, measuring the stress through a single item will give broad, but more reliable, information on the stress experienced by the users of justice.

### **Emotions**

A slightly different approach will be used to measure the process-related emotions. Since it is difficult to conceptualize the impact of emotions, the instrument asks whether the particular user of justice has experienced certain emotions because of the process. A set of 5 emotions was identified on the ground of their relevance to the experiences of users of justice:

- Frustration
- Anger
- Humiliation
- Disappointment
- Hopelessness

All of the identified emotions are negative, meaning that they decrease the perceived quality of the path to justice and, consequently, impact its accessibility. It is possible that the user experiences positive emotions on a path to justice – i.e. happiness, relief, confidence or triumph. Unlike the negative emotions, those could be deemed as benefits, and will not be included in the framework of the costs of paths to justice.

### **Damage to relationships**

The justice process could impair important personal relationships of one or both of the parties. Prolonged family dispute will inevitably affect the family relationships of the disputants. Relationships could be damaged in many different ways. A bitter dispute resolution process over a contractual relationship could additionally disrupt the trust between the parties. Parties could lose trust, love and affection, stop talking to each other, or get violent. In order to avoid an objective definition of damage to relationships, the framework leaves it to the respondent to decide whether they have suffered such damage on their path to justice.

Damage to relationships is more likely to occur in legal problems in which the relationship is an integral part of the dispute. Divorce is a typical example – a

dysfunctional justice process could additionally aggravate the conflict between the parties. In purely transactional disputes, like consumer problems, the relationships between the parties have little value and, therefore, the potential for damage of the relationship between the parties is lower. However, the justice process could also damage interactions with third parties involved in the dispute, such as family members, customers, friends, business associates or colleagues.

## **5. CONCLUSIONS**

High costs of paths to justice are a significant barrier for unobstructed and equal accessibility to justice. Implicitly or explicitly, cost considerations shape the responses to existing legal problems. People compare the expected costs with the anticipated returns and make decisions, which directly affect their access to justice. Without adequate knowledge on the structure and dynamics of the costs of justice, researchers and policy makers are limited in their ability to contribute to the idea of equal and unobtrusive access to justice.

Using the substance of the cost and its measurability as classification criteria, I construct a framework of costs with three categories – monetary, opportunity, and intangible costs. Expanding the focus of research beyond the monetary costs largely improves the understanding of the barriers on paths to justice. As research on the costs of the crime suggest, the non-monetary costs could be a significant part of the total costs of justice. A more concentrated focus on the opportunity and intangible costs of justice could reveal new dimensions of barriers to justice.

Although it is difficult to measure the opportunity and intangible costs, it is important to integrate them in the overall assessment of the total costs of a path to justice. A major challenge for the actual measurement is to draw a distinction between the costs of the problem itself and the costs of the path to justice. This distinction is particularly difficult in relationship based disputes and conflicts.

The general purpose of the framework is to provide a coherent approach towards the costs of paths to justice. Starting from the identified barriers to justice, I group the individual cost categories into broader categories. The use of the categories of monetary, opportunity, and intangible costs provides two contributions to the studies of access to justice. First, the focus on the total cost of the paths to justice provides a more holistic approach to the barriers of justice. Research narrowly focused on the monetary costs risks failing to identify the existence of substantial non-monetary costs, which are prohibitive for access to justice. A second contribution of the framework is that it

provides comparability between the costs of different paths. The differences between the individual paths make it difficult to compare individual cost categories. On virtually all paths to justice, however, it will be possible to detect instances of monetary, opportunity and intangible costs.

Multiple inferences could be drawn from the measurement of the total costs of justice. Univariate analysis could further drive the body of knowledge on the size, variance, and distribution of the costs of paths to justice. Comparing the different categories of costs will indicate potential areas for policy and institutional responses to the gaps in accessibility. Prevalence of one of the cost categories could signal specific shortcomings of a particular procedure. Large, compulsory monetary costs are an indicator of unaffordable processes for solving the existing justice needs. Excessive foregone earnings will be a signal for prolonged procedures and prohibitive investment of resources, which could have alternative uses.

A practical question for further research is how the three cost categories could be expressed in comparable units. As discussed above, monetary and opportunity costs could be translated in monetary terms. Difficulties arise with the conversion of the intangible costs. Valuation of units of stress, emotions, or damaged relationships is difficult, if not impossible. An alternative approach to finding the total costs of the procedure would be to measure the monetary and opportunity costs on ordinal scales similar to those employed to measure the intangible costs. The downside of this approach is that it will be impossible to calculate the monetary value of the total cost of the path to justice. Instead, the measure will reflect the total costs on an ordinal scale, i.e. from 1 to 5. The advantage of the approach is that it will allow aggregation with the quality of the procedure and quality of the outcome – the other two indicators with which the project Measuring Access to Justice: The Hague Model of Access to Justice<sup>81</sup>.

Understanding the costs of the paths to justice is critical for the feasibility of the policies and programs designed to improve the access to justice. Particularly, there is a compelling need for further research on the opportunity and intangible costs of the paths to justice.

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<sup>81</sup> BARENDRECHT, et al., How to Measure the Price and Quality of Access to Justice? (2009) J. JURIS 147

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