

# The use and perceptions of open Access resources by legal academics at the University of Cape Town (UCT) in South Africa

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**Abstract:** Although access to primary legal materials in South Africa is now easily accessible as a result of the Free Access to Law movement, access to legal scholarship is not as easy. Through using the University of Cape Town (UCT) as a case study, due to its research intensive nature, it is possible to see how academics are publishing their legal scholarship through the use of bibliometrics and data mining. After the success of a Research Visibility month, law librarians were able to attest to the perceptions of legal academics around the importance of the openness and visibility of their research. The author contrasts these two to see if the perception of legal academics around the visibility of their resources reflects their publishing practices. It is seen that although academics at UCT publish mostly in closed journals, the publishing in open and hybrid journals has slowly increased during the period 2011-2015. Further it is evidenced that legal academics are exploring other avenues, including that of self-archiving, to boost the visibility of their work. Law Librarians are able to assist in boosting at least the visibility, if not the openness of legal academics' work.

**Keywords:** open access; legal scholarship; academic perceptions; South Africa

## 1. Introduction

### 1.1 OPEN ACCESS AND LAW

Open Access as a movement has its roots in the internationally recognised right of freedom of information<sup>1</sup>, which includes the right of access to information. The recognition of this right has been embraced by various countries through passing legislation that gives effect to the right, most notably 'the right to know', and therefore the right of access to government information. The Open Access movement has been embraced in legal circles through the international Free Access to Law movement and through the signing of the Durham declaration. The Free Access to Law movement outlines their reasoning in an official statement:

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<sup>1</sup> Article 19. UN General Assembly, Universal Declaration on Human Rights, 1948 <<http://www.un.org/en/universal-declaration-human-rights/>>.

“Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;”<sup>2</sup>

The focus is on the right of access to information held by government, which is seen as information being in the public domain. This refers to primary sources of law, such as legislative instruments and case law. In South Africa, the right of Access to Information is enshrined in the South African Constitution<sup>3</sup> and again the focus is on access to governmental information. However, the right contains a much broader scope as it includes access to:

“any information that is held by another person and that is required for the exercise or protection of any rights.”<sup>4</sup>

The Free Access to Law movement has built on ensuring that primary legal materials such as cases and legislation are free to access, however the free access to legal scholarly works still remains an area in which growth is needed. In the legal context, it can be argued that scholarly legal information is what explains the law, and specifically identifies gaps in the law and suggests measures that can be taken. The author is of the opinion that access to scholarly legal information falls broadly under Section 32(ii) of the South African constitution, as this is information that assists in the protection of rights.

Although there has been some discussion, literature regarding open scholarly legal information is scarce. In 2006, Carroll<sup>5</sup> urged scholars to share their work openly through a number of technologies that were available to address the lack of openly available legal scholarly works. Danner further expanded upon this need for legal scholarship to become available, as legal scholarship discusses and analyses the law and is able to point practitioners to pertinent legal information, specifically to the primary sources that may assist them<sup>6</sup>. Legal scholarship is also an essential

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<sup>2</sup> Legal Information Institutes, ‘Montreal Declaration on Free Access to Law’, 2002 <<https://www.canlii.org/en/info/mtldeclaration.html>> [accessed 28 July 2017].

<sup>3</sup> Section 32 of Constitution of the Republic of South Africa, 1996.

<sup>4</sup> Section 32(ii) of Constitution of the Republic of South Africa.

<sup>5</sup> Michael W. Carroll, ‘The Movement for Open Access Law’, *Lewis & Clark Law Review*, 10.4 (2006), 741–60 <<http://dx.doi.org/10.1525/sp.2007.54.1.23>>.

<sup>6</sup> Richard A Danner, ‘Applying The Access Principle In Law: The Responsibilities Of The Legal Scholar’, *International Journal of Legal Information*, 35 (2007), 355 <[http://heinonline.org/HOL/Page?handle=hein.journals/ijli35&div=29&start\\_page=355&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://heinonline.org/HOL/Page?handle=hein.journals/ijli35&div=29&start_page=355&collection=journals&set_as_cursor=0&men_tab=srchresults)> [accessed 27 July 2017]. This sentiment was repeated in his 2012 article, Richard A. Danner, ‘Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue’, *Journal of International Commercial Law and Technology*, 7.1 (2012),

resource in developing legal discourse around topics in law both old and new.

A large advantage of the open agenda is that it boosts the academics' visibility as well as their impact. For the purposes of this study, visibility refers to how accessible a legal academic's work is via the internet without paying fees, excluding the ability to read the full text, while openness refers to the ability to access and read the full text without paying fees. These two concepts are often tied together, and while the author advocates for full openness, the author is of the opinion that the first step is to rectify the lack of visibility of legal scholarship before tackling the complete openness of legal scholarship.

## 1.2 OPEN LEGAL SCHOLARSHIP: THE SOUTH AFRICAN CONTEXT

In the South African context, open access to legal materials is not just a luxury but a necessity in a country where legal materials are often tied up in expensive commercial products. This makes them unaffordable to small firms, NGOs and even certain government organisations thereby serving to hamper the ability to function effectively. In general, lack of access to research has been bemoaned as being a developmental issue, hampering the ability of less developed countries to put forth quality research and to build upon quality research<sup>7</sup>. In the author's opinion, lack of access to scholarly legal information is much more than just a developmental issue, it is an issue of social justice. While other subject areas, such as the sciences, build upon their research areas in universities and research centres, law builds upon itself in the practice of the law, in the lives of everyday people and companies. Legal scholars critically analyse the law that is used every day and submit it to the rigorous testing of academia. They then build upon this law through suggesting alternative approaches, or solutions, to the problems identified. This not only impacts the development of a country, but also its ability to mete out justice to the best of its ability. Databases are quickly pricing themselves out of governmental reach, and as such the invisible scholarly legal information is easily overlooked by a court official

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65–79 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1945228](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945228)> [accessed 27 July 2017].

<sup>7</sup> Denise R. Nicholson, 'Open Access Is a Development Issue – the Status Quo Needs to Be Challenged', *The Conversation*, August 2015 <<https://theconversation.com/open-access-is-a-development-issue-the-status-quo-needs-to-be-challenged-46105>>.

presiding over a matter. Legal academics have a responsibility to share their intellectual product with not only academia, but also with the country.

In 2016, Bopape<sup>8</sup> analysed the amount of resources available and how legal academics were sharing their resources in South Africa. He found that there were 27 accredited law journals in South Africa but only 5 of these were Open Access, the rest being available through subscriptions to the LexisNexis, Juta, HeinOnline and Westlaw databases. Most concerning was the lack of indexing found amongst the South African publishers (Juta and LexisNexis) within international indexing databases. Although the Southern African Legal Information Institute (SAFLII) has made great strides in uploading all South African cases and legislation as open material, this access is counter balanced by the lack of legal scholarship which delves into the understanding and interpretation of the laws used in the cases. Without access to legal scholarly communication, the parties are not able to discover the discourse surrounding current legal challenges.

Legal academics are aware of the importance of their discourse, as is evidenced from their participation in blogs, research networks, news items and social media. New media spaces such as these are allowing academics to extend their reach, to impart their research findings in a practical context. A recent example of a challenge in South African law arose in a debate around the interpretation of one of the provisions in the Constitution of South Africa relating to the binding powers of the Public Protector on government entities. This debate ended up with the Constitutional Court of South Africa being approached for an opinion as to whether the powers were binding or not. In the wake of the Court's opinion finding that the powers were binding, legal academics specialising in Constitutional Law at UCT used the platform of *The Conversation*<sup>9</sup> to analyse and debate the judgment. These pieces were often picked up by newspapers, and shared widely via social media, indicating the interest in legal discourse around current issues.

Another example is a blog run by Pierre de Vos, an academic at UCT, contributing to his being recognised as a constitutional law expert in the country<sup>10</sup>. However when trying to measure his impact through bibliometrics it seems as though he has almost no impact, reflecting an h-

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<sup>8</sup> Solomon Bopape, 'The State of Open Access Adoption in Legal Scholarly Communication: An Analysis of Selected Open Access Resources', *Mousaion*, 34.1 (2016), 83–100 <<https://journals.co.za/content/mousaion/34/1/EJC190691>> [accessed 27 July 2017].

<sup>9</sup> *The Conversation* is a website that describes itself as "...an independent source of news and views from the academic and research community, delivered direct to the public."

<sup>10</sup> The blog is called *Constitutionally Speaking* and is openly accessible to all.

index of 1 on indexing databases Scopus and Web of Science. Through his blog and use of social media, he has been able to expand his reach tremendously and share his academic research with the world. He is a unique case in the legal world of South Africa and a successful case of alternatives to scholarly publishing.

Cases such as the above demonstrate the potential that scholarly legal works have for social justice. Scherlen and Robinson<sup>11</sup> analyse the meaning of social justice in the context of open access, with reference to both John Rawl's *Justice as Fairness* and David Miller's *Principles of Social Justice*. They argue that the restriction of access to knowledge contradicts the principle of equality as envisioned in both Rawl's and Miller's works. In conjunction with the social justice theory, they also refer to international law that identifies access to scholarly information as a recognised right. Scherlen and Robinson come to the conclusion that current practices violate the principle of equality, including that of equal opportunity and minimising difference. The current publishing practices continue to benefit only those that can afford access to the information. They find that open access publishing practices are more consistent with social justice, as open access promotes the principles of liberty, opportunity and equal access to information. Their conclusion is that specifically as scholars in the criminal justice field, they should be setting an example for publishing in a way that promotes social justice rather than negate it. This can only be achieved through publishing open access.

This finding is not limited to the criminal justice subject field, but can be argued for all legal subject fields. Law as a discipline is concerned with justice and fairness, and thus is a discipline that seeks to uphold social justice. In practice, lawyers do this through taking on cases pro bono. Legal scholarship can achieve this through opening up their publishing practices. Little has been written about how legal academics choose the journals they publish in, and the author could not find any evidence for specific criteria used by academics in choosing legal journals to publish in in South Africa. From the author's experience, it seems as though South African legal journals have very low impact factors, in some cases the factor is not even quantifiable. The author surmises from her experience within the UCT Law Faculty, that journals are chosen on reputation basis, and from the experiences of other academics, rather than on any specific quantifiable criteria. More specifically, academics probably choose to publish in a

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<sup>11</sup> Allan Scherlen and Matthew Robinson, 'Open Access to Criminal Justice Scholarship: A Matter of Social Justice', *Journal of Criminal Justice Education*, 19.1 (2008), 54–74 <<http://dx.doi.org/10.1080/10511250801892961>>.

specific journal because their perception is that the journal is prestigious or better to publish in than another. The reason for this could be that the journal has a lot of academics publishing in it, the journal has been published for many years, the publisher has built a strong reputation or that more experienced academics advised on publishing in that journal based on their experience. These are all subjective to the academic, and thus it is in the perceptions of legal academics around the advantages of the openness of legal resources that the key lies in broadening the access to (and openness) and visibility of their scholarly communication.

## **2. Methods**

The University of Cape Town is the highest rated university in South Africa (according to the 2018 QS rankings). It is a research intensive university, that is, the focus of the university is on quality research being produced by its academics. Therefore, UCT would make a good case study in terms of investigating the practices and perceptions of legal academics when looking at scholarly legal research.

The author used a mixture of data mining and bibliometrics to determine the publishing practices of the Law Faculty at UCT, specifically using the databases of InCites, SciVal and data obtained from the Research Office that consists of scholarly articles submitted to accredited journals. The period of 5 years from 2011-2015 was identified. The data from all three sources were cleaned and analysed, which included correcting the ISSN numbers, confirming the publisher and marking the journal statuses, as reflected in DOAJ, Sherpa/Romeo and on the journal websites themselves, as either being “open”, “hybrid” or “closed” (access through subscription only) model journal.

Further to this data, usage statistics for the following websites were obtained: Sabinet journals (SA ePublications), Juta and SAFLII. Contrasting the use of the academics at UCT of legal journals with the publishing behaviour indicates whether open journals are indeed preferred by academics. The data from all three sources were cleaned and analysed, which included limiting the years, and confirming the count of access. Comments as to the reasoning behind this behaviour is provided through evidence collected by the Law Librarians at UCT, during engagements with legal academics in a Research Visibility month around legal information source use and publishing. A limitation to this collection is that usage statistics for SAFLII were only available from June 2017, therefore the usage of both Sabinet and Juta was limited to June 2017-September 2017 to be comparable to the SAFLII usage statistics. SAFLII usage statistics relied on identifying access through IP address, and so those that came from a UCT IP address were designated as belonging to UCT. This does not

address those that are from the university that are accessing from outside university IP addresses that may still be using open resources.

### 3. Findings and argument

#### 3.1 UCT LAW FACULTY PUBLISHING HABITS

Over the period 2011-2015, the UCT Law Faculty published 329 articles, primarily in journals that are only visible through subscription, namely closed journals (see figure 1). A large reason for this is the monopoly on the law journals held by commercial publisher<sup>12</sup>. In South Africa, Juta is the primary publishing company of the top law journals. Out of the 329 articles, only 56 were published in Open Access journals.

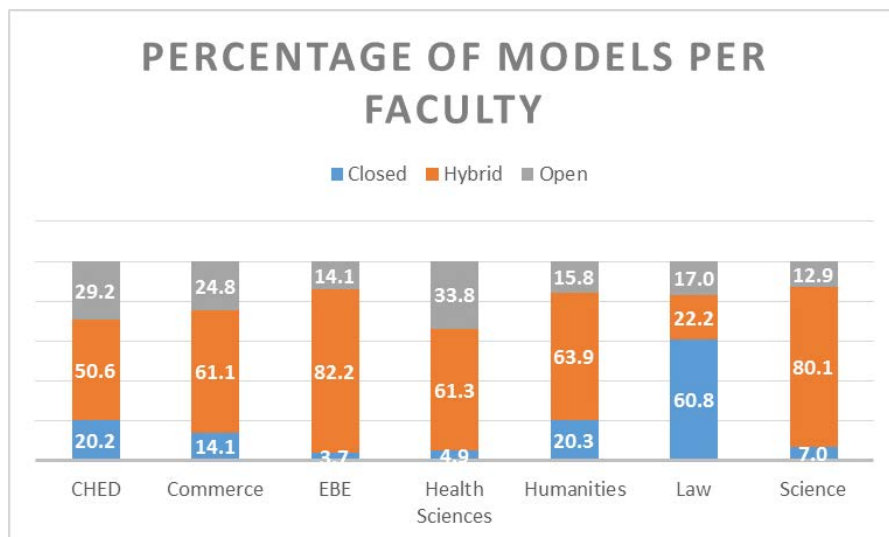


Figure 1: Percentage of journal publishing models of all faculties at UCT (from left): Centre for Higher Education and Development (CHED), Commerce, Engineering and Built Environment (EBE), Health Sciences, Humanities, Law and Science.

<sup>12</sup> Richard A. Danner, 'Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue', *Journal of International Commercial Law and Technology*, 7.1 (2012), 65–79 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1945228](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945228)> [accessed 27 July 2017].

Over the five year period, the Open Access publishing remained relatively stable, but increased overall (figure 2). What indicated the most growth was hybrid journals, which allow the author to make their articles open for a fee.

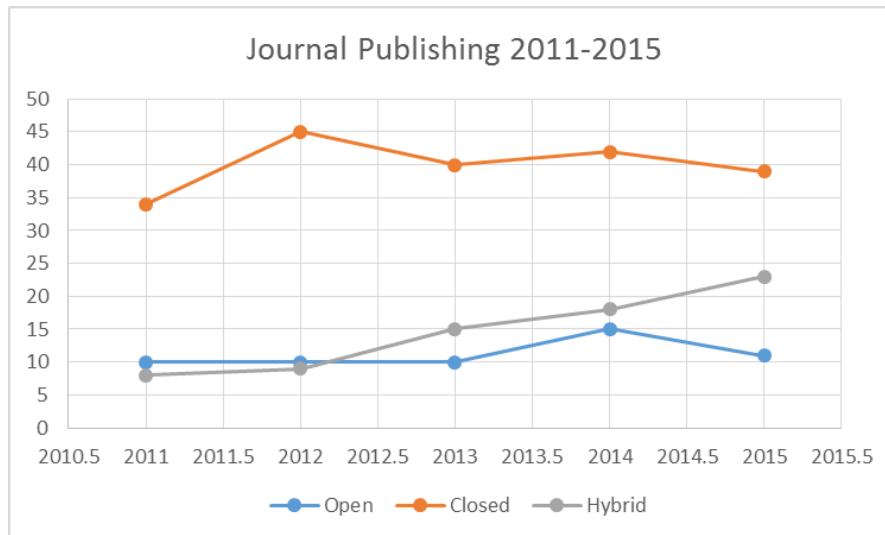


Figure 2: Journal publishing patterns of the UCT Law Faculty 2011-2015

Out of the top 10 journals published in by the Law Faculty during this period, two journals are gold Open Access (*Potchefstroom Electronic Law Journal* and *South African Crime Quarterly*) and three are hybrid journals (*South African Journal on Human Rights*, *South African Journal of Environmental Law and Policy* and *Journal of African Law*). The remainder are closed journals.

### 3.2 UCT LAW JOURNAL USAGE

The three databases selected for this study are Juta, Sabinet and SAFLII. The Juta database is a subscription only database and not indexed elsewhere, meaning that without the link to the journal database, even open access articles are not visible. Sabinet journals database is also a subscription database, but is indexed and thus the open access content that it hosts is more visible. SAFLII is a gold open access database which is easily visible. All three databases play host to law journals, with some journals being accessible on more than one of these platforms. The amount of law journals is shown in Figure 3, displaying that Sabinet has the highest amount of law journals, while SAFLII has the least.



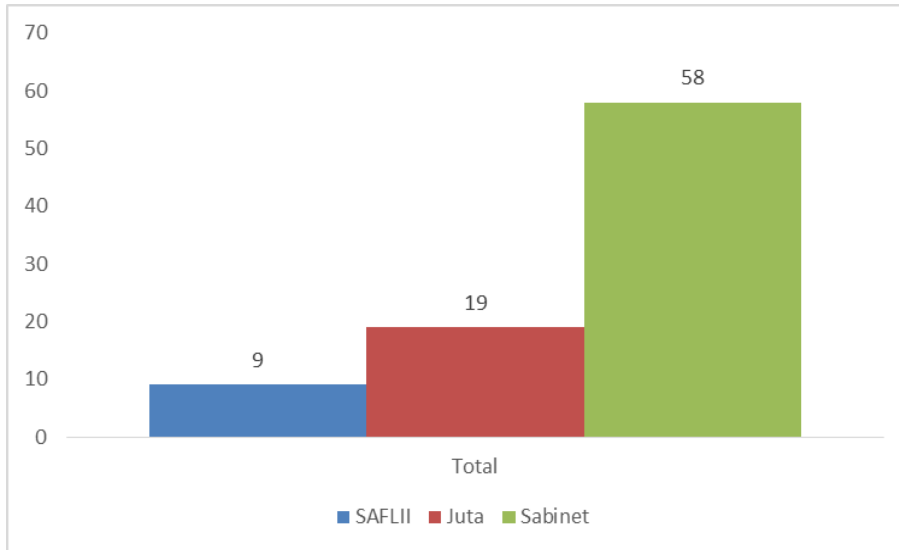


Figure 3: Amount of Law Journals in each database

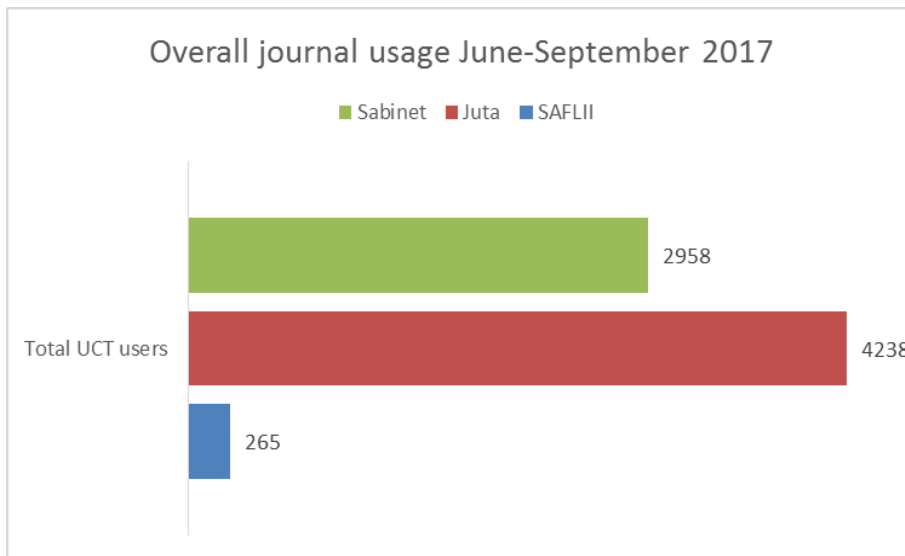


Figure 4: Amount of unique users accessing the journals on the Sabinet, Juta and SAFLII databases from June 2017-September 2017

Over the period June 2017-September 2017, UCT usage of the Juta database, Sabinet database and of SAFLII reflected a heavy reliance on the subscription databases when looking at the journals accessed (see Figure 4). Juta was accessed the most (4238 times), while Sabinet was accessed the second most (2958 times) and SAFLII was accessed the least (265 times).

The journals on all three databases were cross-referenced to find any duplications. One journal, the *Constitutional Court Review*, was available on all three platforms. Another two journals (*Potchefstroom Electronic Law Journal* and *Law, Democracy and Development*) were available on both SAFLII and Sabinet. Usage of these three journals is illustrated in Table 1 below:

*Table 1: Usage of the three journals in different databases*

Journal name	SAFLII	Sabinet	Juta
Potchefstroom Electronic Law Journal	163	0	N/A
Constitutional Court Review	37	0	42
Law, Democracy and Development Law Journal	24	8	N/A

From the above it can be seen that UCT academics are choosing to access their articles through SAFLII where possible. However, Juta still remains the main database for law journal use, most likely due to the publisher's status in the legal field. However, when looking at the access of the *Constitutional Court Review*, the difference between SAFLII and Juta is 5 articles, which does not bring the author to believe that there is a clear preference between the two. Between Sabinet and SAFLII, however, there is a clear preference for SAFLII, most likely due to the better visibility of SAFLII.

During discussions with the UCT law academics at the Research Visibility month, it transpired that many academics were unaware of the invisibility of closed journals. This was further iterated by law academics that were journal editors stating that they would look at moving to more open and visible systems, specifically moving towards the hybrid system. Faculty members were also more interested in being able to conduct self-archiving, and were happy to be offered assistance. With discussion as to the tools used by Faculty for research, it was found that Faculty relied

mostly on open resources, specifically using Google as their search engine, or Google Scholar. When confronted with the news that Juta, LexisNexis and Westlaw were not indexing their information in Google, the faculty members seemed shocked and started to question as to why the commercial vendors were not visible. It indicates that academics rely on the easiest resources to find, which are usually open resources available through Google, or resources that are indexed by Google and available via IP verification as a result of university subscriptions.

#### **4. Conclusions and Recommendations**

Although academics are publishing mostly in closed journals, there is growth in publishing in open and hybrid journals. When analysing the top 10, it can be seen that open and hybrid journals are equal to the number of closed journals, thus indicating that the acceptance of publishing in journals that are openly available. Academics at UCT do not want their work hidden behind paywalls, and are starting to embrace one of the different routes of open access, namely self-archiving or alternative publishing routes. Usage statistics reflect that academics use the database that hosts the journal, and when presented with an option of more than one database, do not have a clear preference. Most likely it relies on the specific academic's needs and ability at the time, specifically whichever database they find easiest to use.

As it currently stands, the publishing practices of the UCT Law Faculty are not consistent with the principle of social justice, as much of the scholarly legal works being published are hidden behind paywalls and therefore only benefit those that have the financial ability to access the databases. However, as is evident from the alternative methods to traditional publishing being used by academics (such as The Conversation), this inconsistency with the principle of social justice is not as a result of deliberate academic behaviour, but rather the result of publisher behaviour and the traditional perceptions of legal academics with regards to publishing and journal status.

Law Libraries can assist academics in South Africa through advising them about ways to self-archive, or advising on publishing alternatives. Further to this, law librarians are positioned perfectly to assist academics in self-archiving and research profiles, including that of non-institutional repositories such as SSRN, Researchgate and Academia.edu. Through using their connections in the faculty, law librarians are able to start to change the perceptions of legal academics with regards to publishing, specifically in terms of the visibility of the research being

published. Law libraries are also uniquely positioned to act as a liaison between publishers and legal academics, specifically with regards to questioning the practices of publishers. It was found when liaising with Juta (one of the main commercial publishers) that publishers are willing to look at alternatives for allowing legal scholars to make their work more visible, if not allowing for openness through self-archiving. The publisher understood the importance of legal information, and the importance of its visibility, and after being contacted by the author of this paper, committed to making their products more visible.

It can be seen that legal academics in South Africa are wanting to make their work more accessible, and are understanding of the importance of scholarly communication, but are not aware of how to make their work more accessible. Law librarians play a vital role in encouraging legal academics and partnering with them in order to disseminate the legal academics' work more widely.

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