

# Open Access Law Journals in South Africa – feasibility and advisability thereof.

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## Introduction

The 2002 Budapest Open Access Initiative describes Open Access to scholarly research as “free availability on the public internet”.

Although there are many law journals and newsletters published in South Africa in this paper I refer specifically to the academic law journals only. This presentation will put forward an argument for the open access of these journals. This proposal should really be put to the editors of the law journals. However, I am grateful to have this platform to put forward the idea and thank you for being here.

Imagine a situation where every prosecutor, every magistrate, every candidate attorney, every attorney and advocate and all the legal advisors in SA and anyone else with an interest, could go to one free internet site and do a search for South African academic law journal articles on a legal topic, get a list of references and then be able to go to and read the full text of those articles. How many of these people in the legal profession have access to the journals now? I believe it is a small minority only. Are authors content with such a small and mostly elite audience?

Open Access to all of our law journals is surely the ideal situation that we must try to achieve for the South African legal profession, both authors and readers. Open access will enable many more people to read the articles, apply the authors' ideas to their own work and cite the articles. And it is possible because South Africa is in a unique position because we have only about twenty-six academic law journals. Something special and unusual can be done here if we can get all the editors and authors to see the benefits and get them all working to achieve this goal. (This is a tall order I know.)

At this stage the journals are only available to those wealthy enough to afford them or to those working in academic institutions. For the rest of the legal profession they are simply not available. Access depends on your ability to pay. What a waste of scholarship. Do authors really wish for this situation to continue? Given the choice I am certain they would opt for greater access.

**Commercial Publishers** of law journals played a valuable role in the past but today it can be said that they place limitations and restrictions on the journal, not only with regard to accessibility, but also with regard to space and time. Publication in an open access journal is quicker and theoretically there is no restriction on the number of pages. Prof Francois Venter, editor of the South African open access journal *PER* comments “*advantages include directness of control over the end-product (no middle-agents, e.g publishing houses), hardly any limitations on volume, global exposure and speed of publication.*” (Pers comm)

If all the South African academic law journals could be published free online by the institutions to which they are attached instead of by the publishers, we could have a

situation where all the journals could be read by anyone in South Africa or overseas. It should be mentioned here that the journals could also be published by open access publishers who would then host the journal for a fee. It would be required to compare the costs of own publishing as opposed to using an open access publisher.

This is not a criticism of law journals at all. I am not advocating they change in any substantial way. This is a recommendation that they change their accessibility so as to broaden their readership. There need be no change in quality, reputation or contents. In South Africa it is very unlikely that the academic journals are financially very rewarding to the publishers. Having seen some of the subscriptions figures it is clear to me that this is not something publishers make much money from. I suspect it will not be a great loss to them.

**Is this a revolutionary change?** The revolution I am suggesting is to move away from commercial publishers in order to be able to offer the journal as an open access journal free of charge. But it stops there. There is no suggestion of any change to the journals themselves. I believe that these peer-reviewed academic journals have gone through years of thoughtful development and the scholarship contained therein is of a high standard. The change suggested is simply to make them freely available to anyone who could use the valuable guidance they provide.

**Access ends when your subscription ends.** With the commercially published online journals you only have access as long as the subscription lasts. If you end the subscription you lose all access, unlike the paper format where you always have what you have already purchased. This is another reason for our law schools to consider open access to all users. From the list below you can see that most of our academic journals emanate from law schools, but are published commercially. It is proposed that the law schools take on the publishing of their own journals and ensure that the journals are then available free of charge at all times to anyone.

**Copyright** issues. At this stage authors assign copyright to the publishers. They in turn contract DALRO to collect the copyright charges from institutions such as the universities. These charges cost universities large sums of money. This is despite the fact that the users of the material (mostly students) are using only one copy each for study purposes. Our Copyright Act 98 of 1978, states:

*Section 12. General exceptions from protection of literary and musical works*

*(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-*

*(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;*

As far as I am informed, in general the publishers hold copyright and receive the charges collected by DALRO. In effect the universities pay for the research and then must again pay large copyright fees to use the published results of that same research, for their own students. Universities, in fact, bear the costs of: research; scholarly writing; editorial work; library subscriptions and copyright fees. This is a heavy burden. Authors need to receive acknowledgement for their work and ideas, and that does not change with open access. I doubt that the author of a law journal article expects to receive payment from someone using the article for their work or for study purposes.

Open Access authors tend to go for Creative Commons licences to protect the intellectual property rights of their work.

**Current availability.** At this stage almost all the South African law journals are published in paper format and one obtains the material by means of subscriptions from the publishers. Some titles are also available online from the publishers. Many titles are also contained in the full-text commercial databases *SA ePublications* from *Sabinet*, and *HeinOnline*. See table below:

<b>Journal title</b>	<b>Institution</b>	<b>Publisher</b>	Full-text found in <b>SAePublications</b>	Full-text found in <b>HeinOnline</b>	Accredited with <b>DoE</b>
Acta Juridica	University of Cape Town	Juta	√	√	√
Acta Criminologica	Criminological Society of South Africa	-	√		√
African Human Rights Law Journal	University of Pretoria	Juta	√	√	√
Annual Survey of South African Law	Faculty of Law, University of the Witwatersrand	Juta	√	√	√
Codicillus	UNISA	UNISA	√		not
Constitutional Court Review (new from PULP)	University of Pretoria	PULP			new
CILSA – Comparative and International Law Journal of South Africa	UNISA	UNISA	√		√
De Jure	University of Pretoria	Butterworths			√
Fundamina – a Journal of Legal History	UNISA	UNISA	√		√
Industrial Law Journal	University of the Witwatersrand	Juta		√	√
Journal of Estate Planning Law	University of the Free State	UFS	√		not
Journal of Juridical Science (Tydskrif vir Regswetenskap)	University of the Free State	UFS	√		√
Law, Democracy and Development	University of the Western Cape	Butterworths	√		√
Obiter	Nelson Mandela Metropolitan University	NMMU	√		√
Potchefstroom Electronic Law Journal	University of the North West	UNW	√	√	√
Responsa Meridiana	Student Law Societies of the	UCT & Stellen			not

	Universities of Cape Town and Stellenbosch	-bosch			
South African Journal of Criminal Justice	University of Cape Town	Juta	√	√	√
South African Journal of Environmental Law & Policy	University of Kwazulu Natal	UKZN			√
South African Journal on Human Rights	University of the Witwatersrand	Juta	√	√	√
South African Law Journal	-	Juta	√	√	√
South African Mercantile Law Journal	UNISA	Juta	√	√	√
South African Public Law – SA Publiekreg	Verloren van Themaat Centre, UNISA	UNISA	√		√
South African Yearbook of International Law	Verloren van Themaat Centre, UNISA	UNISA	√		√
Speculum Juris	University of Fort Hare	Butterworths			√
Stellenbosch Law Review – Stellenbosse Regstydskrif	University of Stellenbosch	Juta	√	√	√
Tydskrif vir die Suid-Afrikaanse Reg – Journal of South African Law	University of Johannesburg	Juta	√	√	√
Tydskrif vir Hedendaagse Romeinse-Hollandse Reg – Journal for Contemporary Roman Dutch Law	Society Hugo de Groot, Pretoria	Butterworths			√

**Funders** - there is a trend worldwide that funders are requiring free access to the journal articles that they fund because they believe that this way they can maximise the dissemination of the research they fund. They believe also that this “brings benefits both to the research community and to society at large” (Report p 6).

The report goes on to say “that open access publishing accompanied by the need to pay publication fees, is a significant and growing development” (Report p7). The Wellcome Trust, the Max Planck Society in Germany and the University of California, Berkeley have all made funds available specifically for this purpose. Although grants and funding are not that important in legal research, it is noteworthy that this type of support serves to promote the Open Access movement.

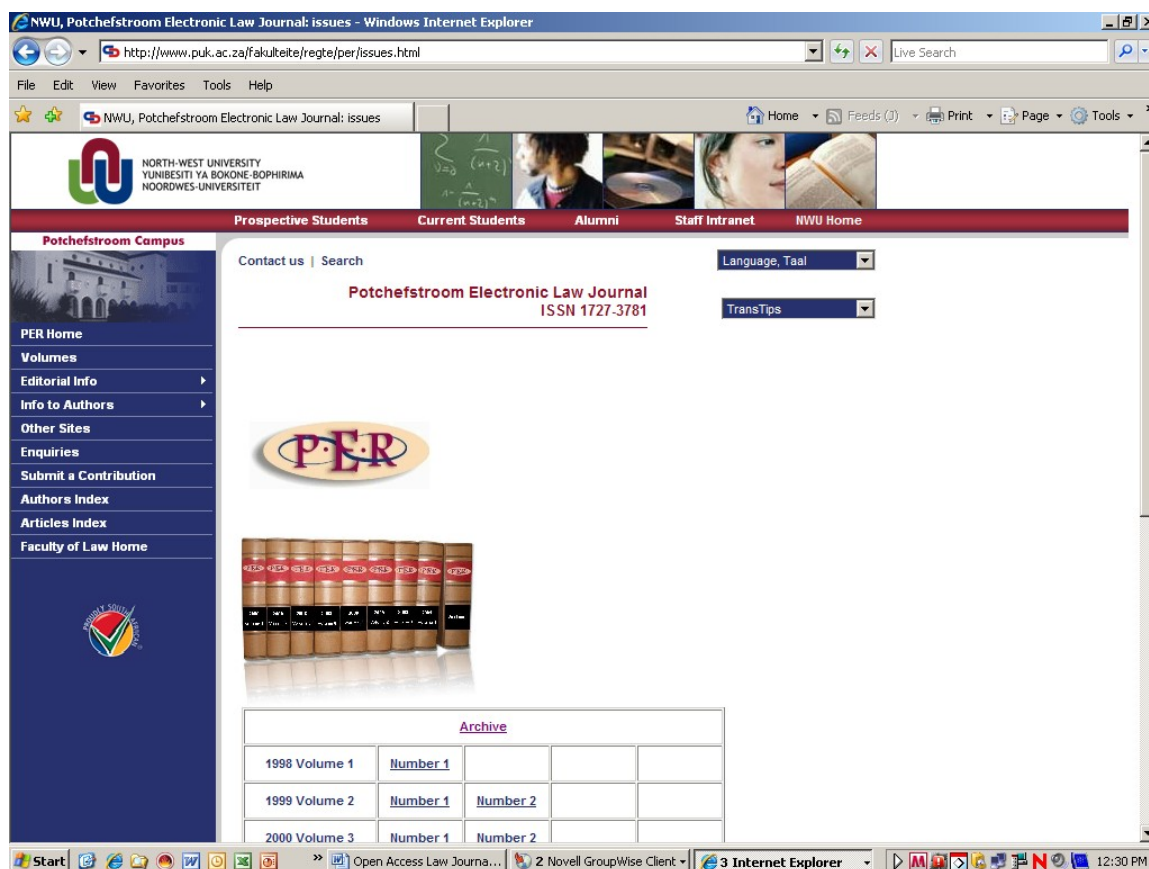
**Costs of publishing.** There are those in the open access movement who believe that the universities need to create budgets to fund open access publishing and this is indeed

happening in places. In South Africa the academic institutions receive fees from the DoE for each paper published in a journal that is listed with the accredited journals. As can be seen from the table above the majority of the the academic law journals are indeed accredited. It seems quite possible that a portion of the DoE subsidies could be used to pay for the open access publication.

It is still possible for open access journals to have a print version for subscription and therefore receive revenue for the journal. Some users still prefer to have their own physical copy. However, in terms of costs, the change will be from a revenue source, the subscription fees, to pay for the publication to a situation where the author (or the institution) will pay for the open access publication.

**Possible paths by which Open Access can be achieved:**

1. Institutions (Universities and Societies) and the Editors of the journals go the path of paying the publisher for the publication so that it can be made available free of charge to all.
2. The Institutions decide to withdraw from the traditional publishers and do their own in-house publishing. An example of a successful free online journal is *PER – Potchefstroom Electronic Journal*:

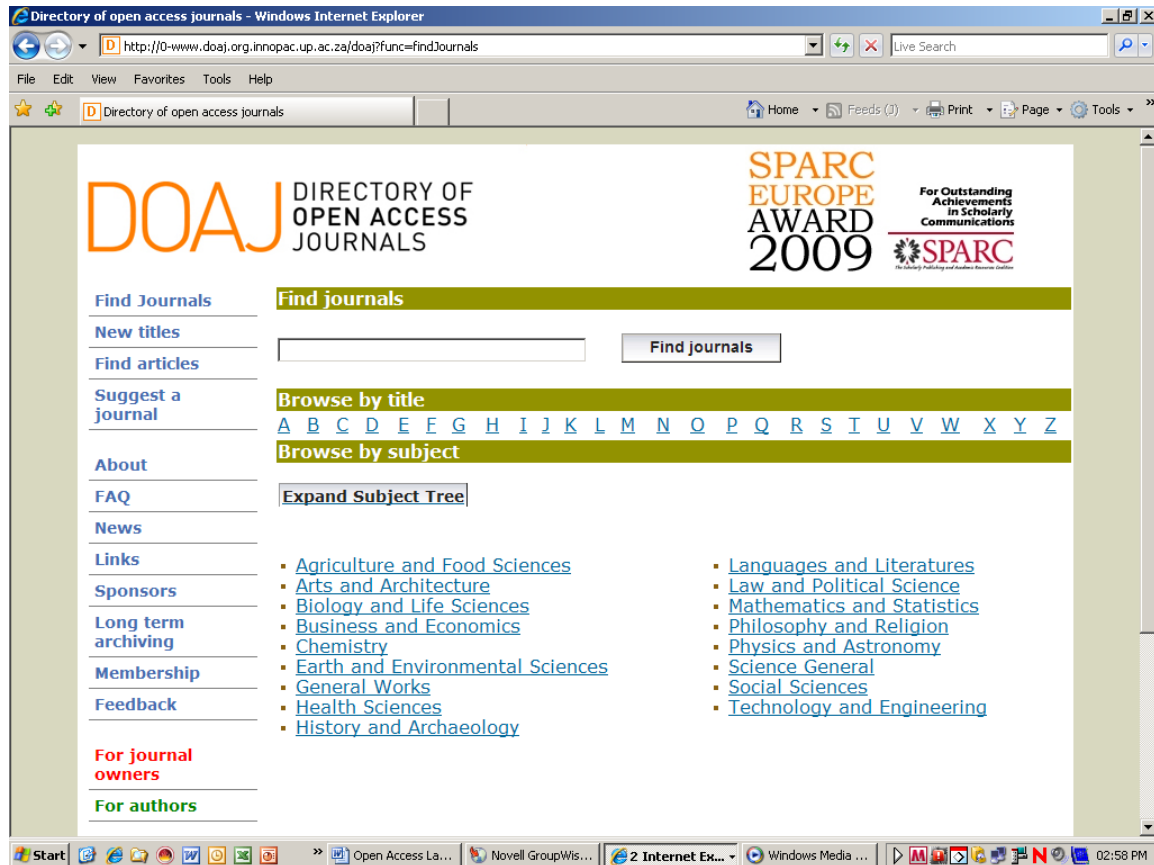


## Searching across all the titles.

Assuming that the journals are all open access it would be recommended that one then requires a platform from which they may be searched together. This would be the key to the success of the exercise. As such the articles are then easy to find and use.

Suggestions include:

1. **DOAJ – the Directory of Open Access Journals.** DOAJ received the SPARC award in 2009 for outstanding achievements in Scholarly Communications. The journals are all available free of charge and can be searched together.



2. **SAFLII** – could be used to host all the open access law journals of SA. They are already hosting the 2 open access journals: *PER* and the *Constitutional Court Review*. SAFLII will not charge for this, they are already a well-known organization internationally and they have a good reputation. It may be suggested that SAFLII could look at including online usage data as well as citation information to this material.

This is what AustLII have done with a long list of Australian law journals:



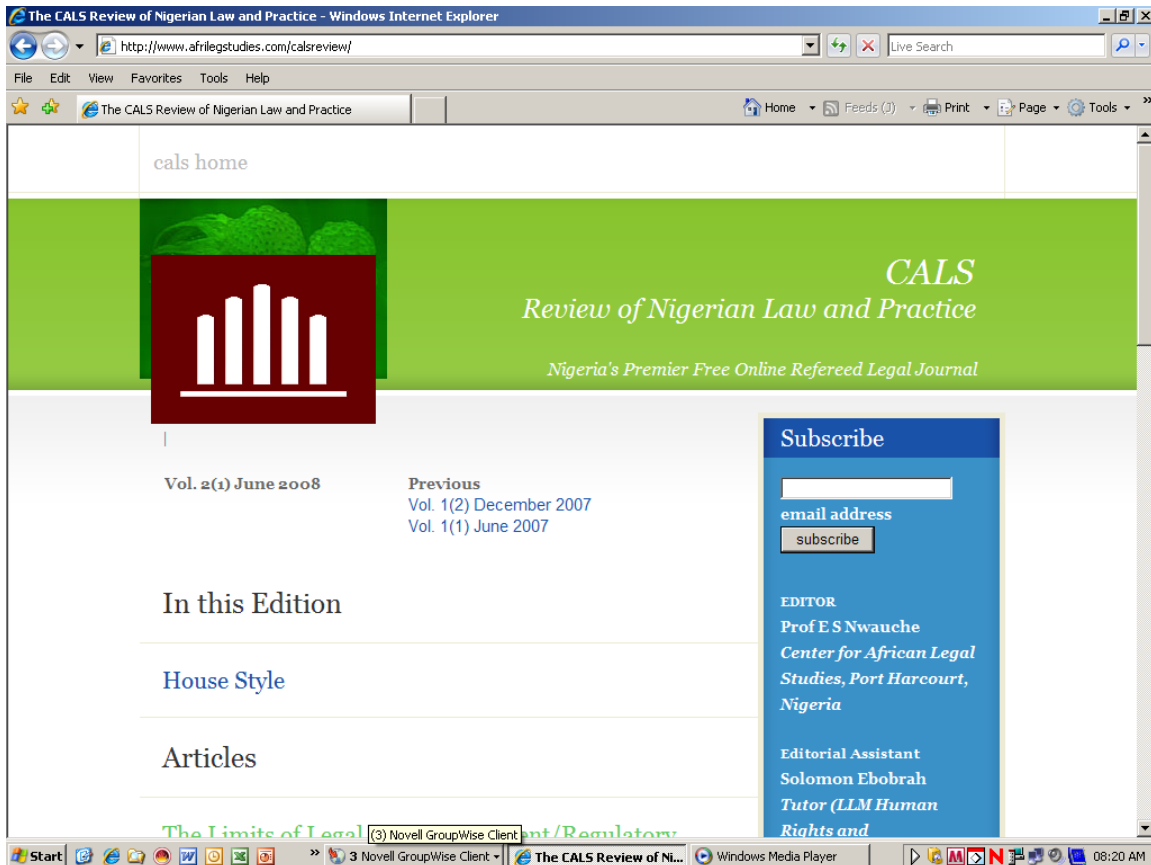
**3. Another alternative** is to create a platform specifically for the South African free online law journals. This would be very attractive to local users as it would be a one-stop shop. However with SAFLII already providing such a service it would seem unnecessary.

**4. Bepress and SSRN.** Berkeley Electronic Press and the Legal Scholarship Network of SSRN are commercial repositories from the US. In these the authors must upload their own articles. Users can download some of the material for free. To me their usefulness lies in the fact that one can go to them for specific known references. They do not seem suitable as a platform for a database of open access law journals in South Africa.

The issue of discoverability is vital and the agreed approach is that the ideal is to have as many ways to find a journal article as possible. It may be advisable therefore to go for a combination of the above. The journals must be findable. The existence and use of this proposed future website, which would hold all of the SA law journals, could be made known to the legal profession by means of the journals themselves. The use of this database can be taught at the law schools through the law library orientation courses. In a short time it could be widely known and used.

**Developing countries.** It is extremely expensive and beyond the reach of many libraries in developing countries to have access to the legal literature of the world. Open Access to law in general will break down these barriers for developing nations.

It is worth mentioning that Nigeria has one open access journal (that I know of), for which they deserve praise. The Centre for African Legal Studies (CALs) has an Open Access to Nigerian Law project. See below:



**What are the disadvantages of Open Access?** In a personnel communication with Prof Venter the editor of PER he mentioned that the disadvantages for them have been the “*limited possibility of generating income from the publication*”, and also “*the scholarly community is slow in recognizing that open access journals are, if properly managed, of exactly the same standard and authority as that of conventional journals published in the old-fashioned manner*”. With regard to the income question, clearly it would be useful to have fees to cover the publication. But one must ask if scholars write articles in order to obtain an income or do they write so that their ideas may be widely read? It is doubtful that these journals make much money. Is it not then more important to concentrate on making the publications as widely, freely and openly available as possible? With regard to the recognition question the law journals that I would like to see change to open access already have established reputations. This should therefore not be an issue. Besides this there are internationally now so many prestigious journals that are open access, that this issue will resolve itself. Prestigious journals that are open access and have high ISI impact factors that I can mention are *Yale Law Journal*; *New York University Law Review*; *Minnesota Law Review*; *Harvard Law Review*; *Georgetown Law Journal* and there are many others.

**Opportunity.** Unlike any other academic field in South Africa there is an opportunity to do something really worthwhile with the academic law journals. Although academics and

practitioners do publish in overseas journals there is within the South African Law journals a valuable and potentially very useful body of knowledge that can be shared with all who might benefit from it. We have a relatively small number of titles that are mostly under the control of the Law Faculties and it is quite feasible that these journals can be converted to open access with the resulting enormous benefits to the legal profession in South Africa.

**Responsibility of legal scholars and institutions?** Danner speaks of improving access to legal information and that legal scholars and institutions have a *responsibility* to ensure that this is done (Danner p.1). This point deserves emphasis because it is very relevant. In Danner's article he refers to Michael Carroll who "arguing for the importance of open access to legal scholarship as well as the documents produced by courts, legislatures and other authorities, Carroll writes: 'Access to law matters...access to legal scholarship matters too'". They speak of a *duty* to maximise the accessibility and impact of scholarship. Carroll also claims that for authors there is a "*duty* to make his or her work available to the general (or, for the time-being, Internet-accessible) public" (Carroll p.756). Authors should be looking at the importance of publishing their articles in such a way that anyone who could benefit from the use of the article in their work should be able to access it without difficulty. The fact that the internet has made this possible has brought with it a responsibility to use the potential that is there to vastly improve access. Danner stresses the point that the "access principle should be taken seriously by all participants in the scholarly communications process:" (Danner, p2)

**Institutional Repositories.** The increasing use of these by academic institutions will make access to articles easier in future. However, I would still recommend that the journals themselves become open access and become part of a database such as that which SAFLII could offer. Everything is then together and is very easy to search and use.

### **Conclusion:**

Quoting from the note by Josh Wilner on p2. "*The open access format of the McGill Journal of Law and Health reflects the journal's institutional commitment that high-quality, peer-reviewed research is a public good that should be available to all*". He goes on to say "*As a publicly-funded organization, we have a responsibility to ensure that new advances in health research are available to those who need it and can use it*". He reminds us also that in 2008 "*the Harvard Law Faculty voted unanimously to make each faculty member's work available online for free*". Harvard University has an Open Access fund called the *Harvard Open Access Publishing Equity (HOPE)* which is used to reimburse eligible authors for open access processing fees.

The case I would make is therefore that the editors and those involved in publishing the South African academic law journals make the change to open access of their journals so that all may benefit from the legal scholarship contained in the journal articles. Studies have shown the open access improves the impact of a journal article.

I quote from the Montreal Declaration on Public Access to Law of 2002: "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*" (my emphasis).

The open access publication of PER demonstrates that it is feasible for South African Law journals. The enormous benefits for both readers and authors from the improved access surely indicates that it is advisable. Many would argue that it is, indeed, our responsibility to do just that.

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September 2009**