



CENTRE FOR LAW
AND DEMOCRACY

Tunisia

Comments on the Draft Decrees Making up the Press Law

April 2011

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The Centre for Law and Democracy

The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy

Introduction

These Comments contain an analysis by the Centre for Law and Democracy (CLD) of the three draft Decrees which together make up the proposed new Press Law of Tunisia.¹ The package of rules consists of an initial draft Decree of just three articles, which serves as the formal vehicle for adopting the press law, the draft Press Law itself (draft Press Law), and another draft Decree on implementation of the Press Law (implementation Decree). These three rules are referred to herein collectively as the draft Laws.

The draft Laws were prepared by a sub-committee of the High Commission for the Realisation of the Objectives of the Revolution and Democratic Transition and published in March 2011. They have been the subject of debate locally, with some observers claiming they are highly repressive and others suggesting they are necessary to curb media excesses in the aftermath of the 14 January revolution.²

These Comments aim to provide interested stakeholders with an assessment of the extent to which the draft Laws conform, and do not conform, to international human rights standards and, in particular, the right to freedom of expression. They provide recommendations for reform, as relevant, with a view to helping to ensure that the laws which are finally adopted give effect, as fully as possible, to this fundamental right.

The draft Laws have a number of positive features. Perhaps most importantly, they repeal the repressive 1975 Press Law. They also do away with licensing of the print media and instead put in place a technical registration system for periodicals.

At the same time, there are some significant problems with the draft Laws. They establish far too broad and onerous registration requirements for all sorts of printed, as well as audio and audiovisual, materials. They envisage harsh punishments for periodicals that do not register properly or fail to deposit copies as required. They establish excessively broad entitlements to the right of reply. But by far the most serious problem is that they establish a wide range of harsh criminal content restrictions which are often illegitimate in the first place but which, in any case, have no place in a press law.

These Comments are based on international standards regarding the right to freedom of expression, as reflected in authoritative statements by international

¹ These Comments are based on an unofficial translation of the draft Law from Arabic into English. CLD regrets any errors based on translation.

² See http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/04/05/feature-03 and http://www.tap.info.tn/en/index2.php?option=com_content&do_pdf=1&id=16434.

courts and other authoritative bodies. Although in some cases these statements are not directly binding on Tunisia, for example because they were made by regional human rights bodies outside of Africa, they do provide persuasive evidence of the meaning of binding international guarantees on freedom of expression.

1. Registers, Declarations and Legal Deposit

The draft Laws propose a complex, and sometimes apparently contradictory, regime for regulating printed material through systems of declarations, legal deposits and registers. For the most part, there are separate rules for periodicals and other printed materials. The term ‘periodicals’ is not defined in the draft Press Law itself, other than to state that these may be published regularly or irregularly (Article 2). The implementation Decree defines periodicals as periodical publications, regardless of shape, which are published regularly under the same title, at close intervals of time, even if irregularly, and where the intention is to continue publication over time, and gives as examples daily, weekly and bi-weekly newspapers, and other magazines (Article 1).

The definition of a periodical is somewhat problematical inasmuch as it would include non-mass media products, such as an ongoing series of publications produced by an NGO or other institution, or even regular internal publications, such as weekly memos to staff in a larger corporation. Key characteristics of the mass media, such as general availability to the whole public and being intended for mass distribution, are missing.

Otherwise, ‘printed categories’ are defined in the draft Press Law as including writings, pictures and photographs, stored on paper or compact discs or in other forms. A few items are excluded such as administrative printed material, ‘city publications’ and election cards (Article 2). The implementation Decree, for its part, separately defines books, compact discs and digitally stored material, as well as periodicals (Article 1). These definitions are extremely broad in nature and include, in addition to mass media, various other types of products, including in written, audio and audiovisual format.

The draft Press Law requires all ‘printed categories’ to be ‘registered on private registers held by the printer, producer, publisher or retailer’, and numbered in sequence (see also Article 9 of the implementation Decree). The responsible printer, publisher or retailer is required to submit a ‘declaration’, in writing, under signature and bearing its official stamp, to the relevant local Public Attorney (prosecutor). In return, the Public Attorney shall provide a receipt and, in case this is not done, proof of mailing the documents to the Public Attorney, for example by registered mail, shall constitute a receipt. After making such a declaration, one copy of each ‘printed category’ shall be provided to the Public Attorney and eight copies to the Ministry of Culture, before the product may be offered for sale to the public (Articles 3 and 4).

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For ‘printed categories’ produced outside Tunisia, declaration and legal deposit is effected by sending one copy to the Public Attorney (Article 5).³

It is an offence to distribute ‘printed categories’ without complying with these formalities. Failure to comply with the rules may attract a fine of between TND500 and 2,000, rising to TND 2,000-4,000 for a repeat offence (Article 6).

Article 12 of the implementation Decree further provides that ‘legal deposit’ shall be by way of submission of a signed declaration in triplicate, containing various types of information, of which one copy shall be stamped by the authority receiving the declaration and returned as a receipt. This declaration must include detailed information about the printer, the person who commissioned the printing, the number of copies, the date and so on, as well as the title and number of publication for periodicals. It would appear that this is the same process which is described as making a declaration in Articles 3 and 4 of the draft Press Law.

A key problem with these provisions is their vast breadth of application, which covers not only periodicals and books, but also other printed materials and even information recorded on CDs and in other digital forms, whether these are for sale or not. This is quite unrealistic, not to mention unnecessary. In the modern world, it is also unlikely to be effective, since modern communications technologies create easily accessible channels for circumventing these cumbersome rules.

A second problem is that this system is unduly onerous, requiring all producers of ‘printed categories’ to send detailed information by registered mail to a local authority, as well as nine copies of their product to the same authority and the Ministry of Culture. This is an unjustifiable constraint on freedom of expression. It is also likely to result in publishers and their clients trying to get around the rules by using alternative forms of information dissemination.

Third, there is a risk that the system could be used to monitor or even to exert control over the media. Otherwise, it is not clear why copies of printed products must be provided to the local Public Attorney and the Ministry of Culture.

Finally, it is not clear what purpose this system is intended to or will serve. As noted, given modern communications technologies, it will not even generate useful baseline information about the nature of the flow of information products in the country.

³ Article 4 also states that where a ‘printed category’ is produced or reproduced in Tunisia, ‘declaration’ shall be made by submitting one copy to the Ministry of Culture. Since Article 5 separately addresses foreign ‘printed categories’, we assume that the main rule for local publications is the one noted above and that this is either a mistake or a mistranslation.

A slightly different set of rules applies to periodicals. Pursuant to Article 7 of the draft Press Law, they shall not be subject to a requirement of prior authorisation (otherwise known as licensing). However, a declaration must be submitted to the local Public Attorney, on paper bearing a fiscal stamp and signed by the editor-in-chief, containing information such as the title, dates of publication, name and address of the editor-in-chief and board members, commercial registration details and so on. Any changes in this information must be notified to the Public Attorney within five days. As for non-periodical 'printed categories', an acknowledgement receipt shall be provided, failing which the delivery receipt for registered mail shall serve as the receipt (Article 10).

Periodicals must provide two copies of each periodical, signed by the editor-in-chief, to the Public Attorney and another eight copies to the Ministry of Culture. Breach of these rules may lead to a fine, to suspension of the media outlet until it has completed the declaration, and even to termination of the media outlet (Article 11).

Pursuant to the implementation Decree, any change in this information requires a new declaration, while failure to commence publication within six months shall lead to the declaration lapsing (Articles 2 and 3). 'Registration' shall be valid for a year, with enough different numbers being provided to place on each individual periodical product (i.e. each newspaper) throughout the year (Article 10).

This system is less problematical than the rules relating to all types of 'printed categories'. In many countries, periodicals are subject to registration requirements. At the same time, these can be used as mechanisms of control. In 2003, the then three specialised international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – adopted a Joint Declaration stating, among other things:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided.⁴

In any case, the system of registration proposed in the draft Laws could be strengthened to reduce the possibility of abuse and to enhance its utility. For example, it would be preferable for the declarations to be provided to a central authority, for example the one responsible for registering businesses. This would protect local newspapers against possible political retaliation from local officials and would also allow the system to serve as a central repository of information about periodicals in the country, as well as to prevent duplication of the names of periodicals.

⁴ Joint Declaration of 18 December 2003.

It is not necessary to require registration to be renewed on an annual basis, particularly since periodicals are required to register any changes in their information. It is neither necessary nor appropriate to require periodicals to provide copies to the Public Attorney and the provision of eight copies to the Ministry of Culture is excessive. Finally, the sanctions for breach of these rules, and in particular the power to terminate a media outlet, are excessively harsh.

Pursuant to Article 33 of the draft Press Law, newspaper vendors or others selling 'printed categories', including photographs, engravings, films and so on, need to lodge a declaration with the municipal service or governor's office in the locality in which they are operating. The declaration shall indicate the name, nationality, occupation and date of birth of the vendor.

As with the general obligation on producers and publishers to make similar declarations, this is unnecessary, unduly onerous and it fails to serve any obvious public purpose. There is no warrant for imposing a special form of registration on the sale of these products, just as this is not required to engage in the sale of other products (such as bread or clothes). The normal rules governing any business are sufficient for dissemination of printed products, as they are for the dissemination of other types of products.

Recommendations:

- A periodical should be defined in such a way that it only comprises mass media products.
- Consideration should be given to doing away with the whole system of declarations and legal deposits which applies to all 'printed categories'. At a minimum, its scope should be drastically reduced to cover only certain types of products – such as books and other mass-distribution items – and it should be simplified, including by reducing the amount of information that needs to be included in the declaration and by limiting the number of copies that need to be provided as legal deposit, and to whom.
- Consideration should be given to providing for declarations for periodicals to be made centrally, for example to the authority that deals with business registration, and to extend the period for renewal of registration, for example to once every five years.
- Periodicals should not have to provide copies to the Public Attorney and consideration should be given to reducing the number of copies that need to be provided to the Ministry of Culture.
- Less severe sanctions should be available for failing to make a declaration or provide copies of periodicals to the Public Attorney and Ministry of Culture and the power to terminate a periodical for this should be removed altogether.

- Article 33 of the draft Press Law, requiring those wishing to sell ‘printed categories’ to obtain a special form of registration, should be removed.

2. Other Regulatory Requirements

1.1 The Right of Reply

Article 27 of the draft Press Law requires periodicals to publish any reply addressed to the editor-in-chief from a representative of a public authority regarding a matter relating to its functions ‘if exposed erroneously’. The reply must be published on the front page of the following issue, but may not be more than twice the size of the original article. Failure to comply with this rule shall be punishable with a fine of between TND1,000 and 2,000.

The editor-in-chief shall similarly publish any reply from an individual who has been directly or indirectly mentioned in a periodical, subject to a fine of between TND500 and 1,000. Article 28 establishes detailed rules regarding the right of reply, including that it shall be published within three days and on the same page as the original article, and shall not exceed 200 lines. The same article also establishes a special regime for the right of reply during elections, as well as expedited court rulings in right of reply cases.

Finally, Article 29 provides for a right of reply for associations representing groups whose reputation or integrity has been attacked on the basis of their race, ethnicity, nationality or religion.

A right of reply can provide an effective remedy for individuals whose rights have been infringed in the media, and in a manner that is far less intrusive to freedom of expression than going to court can be. At the same time, where a right of reply is cast too broadly, it can have a chilling effect on freedom of expression, and can provide a mouthpiece for officials and others to the detriment of the public’s right to know.

International standards call for a right of reply only where the individual in question has suffered a breach of his or her rights, or at least legitimate interests. Resolution (74) 26 of the Committee of Ministers of the Council of Europe on The Right of Reply - Position of the Individual in Relation to the Press, for example, calls for a right of reply only in response to attacks on privacy or on reputation, and for a correction for,

incorrect facts relating to him which he has a justified interest in having corrected.⁵

It is not appropriate to force media outlets to give voice to everyone who happens to have been the subject of some attention in the media. Thus, one should have a right to respond to defamatory allegations in the media, but not to a fair report on activities in which one

⁵ Adopted 2 July 1974. See clauses 1 and 2.

has been involved. Otherwise, the media would become a public debating arena rather than a place for the dissemination of edited content.

Furthermore, where a simple correction would redress the problem – because the media outlet has simply made a factual mistake – there is no need to provide for a right of reply. A correction will right the wrong, and so provide an adequate remedy. Even where a right of reply is warranted, it should be limited to redressing the legal wrong done, and not be allowed to be abused as a platform for raising other issues. 200 lines will almost never be needed simply to redress the legal wrong done.

The rules in the draft Press Law clearly do not conform to these standards. They allow anyone who has been identified in the media to reply, without even requiring that the original article was critical, let alone breached the claimant's legal rights. Furthermore, by establishing special rules for officials regarding the right of reply, the rules are almost an invitation to abuse. Public authorities need to be tolerant of criticism in the media, rather than claiming a right to respond to such criticism. This is likely to lead to media outlets shying away from fulsome criticism of officials to the detriment of the public's right to know. The draft Press Law exacerbates this problem by providing for far larger fines in relation to official claims for a right of reply, as well as by allowing much longer, and hence potentially more abusive, replies by officials.

The idea of providing for a right of reply for attacks on groups is an interesting one. It may not, however, be the best way to address the problem of racist and discriminatory material in the media. It is to be hoped that the media themselves would put in place self-regulatory mechanisms to respond to this sort of concern. The standards on reporting on ethnic and religious issues in most self-regulatory codes for the media in democracies, for example, are quite strict.

1.2 Ownership Rules

The rules governing concentration of ownership of the media are found in Articles 22-24 of the draft Press Law. Articles 23 and 24 seek to promote transparency of ownership concentrations, requiring concentrations to be published (Article 23) or reported to the 'Higher Information Commission' (Article 24). Transparency of media ownership is a good way of addressing the problem of undue concentration of such ownership. At the same time, the Higher Information Commission does not yet exist, and so it does not make sense to refer to it in the draft Press Law.

Article 22 imposes an overall limit of 20% on the share one individual may have of the total market in Tunisia for papers with the same publication regularity, for example dailies. This is potentially useful as a way of addressing media concentrations, but such measures need to be carefully tailored to local circumstances. Thus, such a measure will be effective in a market composed of largely national dailies, but perhaps less so in a market which has dominant national dailies alongside smaller local daily newspapers

(because one person could exert dominance in the local newspaper market and yet not exceed the 20% overall share of dailies).

1.3 Other Rules

Article 19 of the draft Press Law makes it an offence, punishable by a fine of between TND 5,000 and 10,000, for any private individual or foreign legal entity to provide funds to the editor-in-chief or owner of a periodical other than through participation in the share capital or advertising. The purpose of this is no doubt the legitimate one of trying to prevent commercial influence over the content of periodicals, to the detriment of their ability to report in the public interest.

This is, however, an unduly harsh and rigid rule. For example, foreign donors may wish to support a struggling local media or a media serving a disadvantaged or minority community. A businessman may contribute goods to a fundraiser being sponsored by a periodical. Furthermore, it is to be doubted that this rule will be effective in preventing the very harm it is aimed at. Those wishing to exert commercial influence on the media will be able to find underhand ways of doing it, if the media outlets are open to this.

Article 8 of the draft Press Law provides that the director of a periodical shall be 'mature', enjoy all of his civil and political rights, and have a contact address in Tunisia. The editor-in-chief shall be at least 25 years old, enjoy his or her full civil and political rights, hold a university degree and have at least five years of experience (Article 9). Furthermore, Article 13 provides that, for general information periodicals, at least one-half of the editing team must be full-time journalists holding national professional cards and diplomas in media which are recognised by the Ministry of Higher Education.

It is well established that imposing requirements of experience, maturity and training on individuals such as directors, editors-in-chief and members of the editing teams of media outlets is not legitimate. It does little or nothing to ensure that they are able to do the job properly, since there is no guarantee that someone having a university degree and five years of experience will do a better job than someone who lacks these qualifications. Countries which have good media professionals and good media outlets did not achieve this through imposing conditions such as these on media workers but, rather, by building a strong sense of professionalism among journalists. The rules relating to the editing team are particularly problematical since international law does not allow States to require journalists to belong to particular bodies, such as those issuing national professional cards.

Article 31 of the draft Press Law states that the authorities shall define the places where electoral announcements may be posted. To the extent that this refers to

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official announcements relating to elections, it is appropriate. However, candidates for election should be able to use public places to post promotional materials for elections, as long as they commit to removing these materials once the election is over.

Recommendations:

- The rules relating to the right to reply should be considerably narrowed so that a right of correction is provided in response to simple factual errors, the right of reply is limited to cases where a legal right of the claimant has been breached, and the reply is limited in length to what is necessary to address this wrong.
- Article 27, providing for a special right of reply for officials, should be removed.
- Consideration should be given to removing the right of reply to respond to attacks on different groups and to giving self-regulatory mechanisms a chance to try to address this problem first.
- Careful consideration should be given to the rules on overall limits on media ownership to make sure that they are suitably tailored to the actual media market in Tunisia.
- The focus of the rules on transparency of media ownership should be on ensuring that ownership structures are made public, rather than on requiring these to be declared to a body which does not exist as the draft Press Law is being developed and considered.
- Consideration should be given to removing Article 19, which imposes strict constraints on the ways in which periodicals may receive support.
- Articles 8, 9 and 13 of the draft Press Law, imposing conditions on directors, editors-in-chief and members of the editorial teams of periodicals, should be removed.
- It should be clear that Article 31, relating to places where electoral announcements may be posted, is limited to official announcements.

3. Content Restrictions

By far the largest part of the draft Press Law is taken up with criminal restrictions on content. This has attracted considerable attention within Tunisia and strong condemnation from press associations and groups promoting media freedom. We agree with the view that these are the most problematical parts of the draft Laws and that it is quite inappropriate to include such an extensive focus on criminal rules in a press law.

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Many provisions – including Articles 34, 35, 36, 37, 39, 49, 50, 51, 52 and 53 – are rules which, to the extent that they are legitimate, should be included in the Penal Code and not in the press law. They deal with such issues as disseminating material that is illegal, inciting others to crime or hatred, identifying victims of rape and other crimes and publishing information relating to court proceedings.

We consider that some of these provisions are legitimate, while others are problematical when viewed as restrictions on freedom of expression. For example, Article 35 makes it a crime to ‘extol’ certain crimes. We are of the view that while incitement to crime should be a punishable offence, simply extolling crimes should not be. Another example is Article 53, which prohibits publishing information relating to defamation cases, or cases involving confirmation of progeny, divorce and abortion. There may be limited cases where it is appropriate to protect the identity of participants in court cases, but these prohibitions are too broad.

However, for present purposes our main point is that whatever the merits of these restrictions on freedom of expression, they have no place in a press law. These criminal acts are the same whether one commits them through publishing a book, publishing a newspaper or by shouting on the street corner (although the punishment may vary depending on how the crime is committed). And many of these rules do already find expression in the Tunisian Penal Code, and indeed these Penal Code provisions are often referred to explicitly in the draft Press Law. Repeating such provisions in a press law suggests that the crimes are specific to the press, which they are not. It also somehow sends a special warning to the media not to engage in these crimes, which may exert a chilling effect on press freedom.

As the special mandates on freedom of expression stated in their 2003 Joint Declaration:

Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.⁶

A significant number of the criminal restrictions in the draft Press Law, including Articles 41-48, relate to the issue of defamation. The general point made above, namely that to the extent that these are legitimate, they should be included in laws of general application rather than in the press law, is applicable to these provisions. We are also of the view that defamation should not be a criminal offence but, instead, that it should be civil in nature. We note that the draft Press Law actually reverses this rule, providing, in Article 60, that no private (i.e. civil) case should be carried out independently of a public (i.e. criminal) case. We also note that many of these provisions carry severe penalties, in some cases of imprisonment for up to

⁶ See note 4.

three years, contrary to international law, which requires sanctions to be proportionate.

In a Joint Declaration adopted in 2002, the special mandates on freedom of expression stated:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁷

There are a number of other serious problems with the specific rules on defamation in the draft Press Law. The primary rule, set out in Article 41, applies whenever a statement 'may affect' the reputation or dignity of a person or official body. Article 44 similarly rules out 'insults' which affect the dignity of individuals or official bodies.

Many statements of legitimate public interest 'may affect' someone's reputation. For example, exposing the (true) fact that a politician has been engaged in corrupt activities will no doubt lower his or her reputation, but it should equally certainly not attract liability in defamation. A better standard is to render liable only false statements which lower reputation. As regards opinions and insults, it is clear that, under international law, only insulting statements which have no basis whatsoever in fact, and which are unreasonable in all of the circumstances, may attract liability. Thus, international courts have protected statements calling politicians 'idiots', on the basis that this is, if rude and extreme, still a legitimate form of political discourse.

International law also rules out the idea of official bodies bringing cases in defamation, while Article 41 of the draft Press Law actually promotes this. The reason for the international rule is that public bodies do not have a reputation of their own to defend. In addition, they may abuse the power to bring defamation actions, and they also have plenty of other ways to rectify statements they believe are inaccurate, such as countering them through the media.

Article 42 provides for the same rules on defamation to apply to a range of officials such as members of the government and of legislative councils, while Article 48 makes it a crime to attack the reputation of foreign presidents, members of foreign governments and diplomats. Under international law, officials are required to tolerate a greater degree of criticism than ordinary citizens. While this does not deprive them of the protection of defamation law, there is no need to make special reference to their right to defend their reputations. Furthermore, these articles provide for higher penalties for defamation of officials than for ordinary individuals (see Article 43), contrary to clear international standards.

⁷ Adopted 10 December 2002.

Article 65 requires any accused person intending to raise a defence to an allegation of defamation to provide comprehensive information to the public attorney (prosecutor) about that defence, including a statement of facts and the names of witnesses. This is to reverse the normal criminal rules whereby the prosecutor is required to ensure that the accused has all possible means at his or her disposal to defend him- or herself (as part of the presumption of innocence). As a result, not only does the draft Press Law inappropriately treat defamation as a criminal offence, but it also does away with basic protections normally afforded to accused persons, and which are required under international law.

Article 56 of the draft Press Law provides that where a criminal sentence is confirmed, the court may order the offending materials to be confiscated and then to be destroyed. Article 63, which appears to relate mainly to defamation offences, goes much further, allowing the court to suspend the publication for up to three months in the case of a daily (and six months for other periodicals).

These are harsh punishments. In almost every case, the offending material will constitute just a small part of the overall publication (normally just one article). To confiscate a whole newspaper is a disproportionate remedy, at least in all but the very most extreme cases. Furthermore, it is largely ineffective in the case of a newspaper, because distribution will usually already have taken place by the time the order to confiscate is made.

Suspension of a newspaper is even more extreme, indeed the most extreme punishment available, short of permanently terminating a newspaper. It is quite disproportionate in relation to defamation, where damage awards have proven to provide sufficient redress in other democracies.

Recommendations:

- Articles 34, 35, 36, 37, 39, 49, 50, 51, 52 and 53 should be removed from the draft Press Law and should, to the extent that they are legitimate restrictions on freedom of expression, be addressed in the Penal Code.
- Similarly, Articles 41-48, dealing with defamation should be removed from the draft Press Law; instead, defamation should be dealt with as a civil matter, subject to civil redress, such as damage awards, rather than imprisonment.
- The rules on defamation now found in the draft Press Law should, in addition to being dealt with as a civil matter in a law of general application, such as the civil code, be amended to provide appropriate protection for freedom of expression. Among other things the standard for what constitutes defamation should be raised, in relation to both statements of fact and opinions, public

bodies should not be permitted to sue in defamation, and the rules should not provide for special, stronger protection for officials.

- Article 65, effectively reversing the presumption of innocence in defamation cases, should be removed.
- The harsh penalties provided for in Articles 56 and 63 should be removed. Redress for defamation should be civil in nature, normally in the form of a damage award.