

ISSUE PAPER

Mandatory MOUs between NGOs & Local Governments

THE REPUBLIC OF ...

THE NON-GOVERNMENTAL ORGANISATIONS ACT, 2010
TEMPLATE OF MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE LOCAL GOVERNMENT OF

AND

THE

Introduction

This Memorandum of Understanding
between the Local Government

*An analysis of legal concerns and implications
for the freedom of association*

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1. INTRODUCTION

The Constitution of the Republic Uganda guarantees the right to freedom of association and the right of citizens to participate in civic activities. These fundamental rights and freedoms are inherent and must be enjoyed without any form of discrimination. Any limitations are required to be in compliance with the law and demonstrably justifiable in a free and democratic State.

The Parliament of Uganda enacted the Non-Governmental Organisations Act, 2016 (NGO Act 2016)¹ to regulate the registration and operations of Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs) in the country.

Under Section 44(a), the NGO Act 2016 established ‘special obligations’ which, in part, require all duly registered NGOs in Uganda to seek ‘approval’ from the District NGO Monitoring Committee (DNMC)² and proceed to sign a Memorandum of Understanding (MOU) with the local government in the area of operations.

Failure to obtain the approval and MOU means the organisation cannot operate, despite the lawful nature of its activities or the fact that it has secured a registration certificate as an NGO.

Over the past six years, this legal obligation has impacted on NGO operations and applications for renewal of operation permits in the country. This paper provides a legal analysis of the legal obligation for NGOs to sign mandatory MOUs, emerging practice concerns, implications on NGO organizing, and offers recommendations for consideration.

In view of the emerging legal and practice concerns as detailed herein, this paper recommends that Parliament repeals or amends Section 44(a) of the NGO Act 2016. While entering into MOUs can be beneficial in appropriate circumstances, the mandatory nature of the obligation is unconstitutional and is inconsistent with the provisions of the National NGO Policy, 2010.³

¹ Non-Governmental Organisations Act, 2016 [Laws of Uganda]. <https://ulii.org/akn/ug/act/2016/5/eng%402016-03-03>

² DNMC is a local government committee which is established under the NGO Act 2016 to register CBOs, recommend NGOs to the NGO Bureau for registration, and to monitor NGO operations in the district.

³ The National NGO Policy, 2010.

https://www.ngobureau.go.ug/sites/default/files/laws_regulations/2021/04/National%20NGO%20Policy%2C%202010.pdf

2. INTERNATIONAL, REGIONAL AND NATIONAL LAW STANDARDS

The right to freedom of association entails the right of individuals to interact and organise among themselves to collectively express, promote, pursue and defend common interests.⁴ This includes the right to form or join civil society organisations, including NGOs.

The freedom of association is guaranteed under Article 20 of the Universal Declaration of Human Rights (UDHR), Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments. Whereas the right is not absolute, there are strict grounds under which it may be restricted as provided under Article 22(2) of the ICCPR and expounded in the Siracusa Principles.⁵

At the regional level, the freedom is guaranteed under Article 10 of the African Charter on Human and Peoples' Rights (ACHPR), among other Charters. Any restrictions on the freedom of association must satisfy the legality, legitimacy and proportionality standards expected in a democratic society.⁶

At the national level, Article 29(1)(e) of the Constitution of Uganda guarantees the same freedom as an inherent right not granted by the State. The Article further places a legal obligation on all organs and agencies of government to respect, uphold and promote the rights and freedoms enshrined under the Constitution.

The Constitution further provides, under Article 38(2), for the right of every Ugandan citizen to participate in peaceful activities to influence the policies of government through civic organisations.

Under the National Objectives and Directive Principles of State Policy, the Constitution provides that the State shall guarantee and respect the independence of NGOs which protect and promote human rights. The Constitution further provides that civic organisations shall retain their autonomy in pursuit of their declared objectives.

⁴ The Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/topic/freedom-assembly-and-association>

⁵ For more on the Siracusa Principles on the limitation and derogation provisions in the ICCPR: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

⁶ Guidelines on Freedom of Association and Assembly in Africa, <https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa>

3. UNPACKING MANDATORY MOU OBLIGATIONS

The NGO Act 2016 provides under Section 44(a) that:

“An organisation shall –

- (a) not carry out activities in any part of the country, unless it has received the approval of the DNMC and Local Government of that area and has signed a memorandum of understanding with the Local Government to that effect;”*

In addition, the Non-Governmental Organisations Regulations, 2017 (NGO Regulations) expound on this mandatory obligation. Regulation 42 requires that an MOU to contain certain terms and conditions, including expiry date of the MOU, cooperative activities and responsibilities of each party under the MOU, and provision on termination, among others.

Where an NGO fails to meet the demands of the local government, for example where it has no cooperative activities, Regulation 41 provides for the power of the local government authorities to refuse to sign the MOU thereby declining to grant approval for the NGO to work within the local government jurisdiction.

The law provides for a three-layered process for NGOs to comply with the said legal obligation. First, it requires organisations to seek and receive the approval of the District NGO Monitoring Committee (DNMC), a seven-member body chaired by the Chief Administration Officer (CAO) or the technical head of a city. Secondly, the organisations are required to seek approval from the administrative head of the sub-county or division. After obtaining these approvals, the MOUs may then be signed.

In terms of timelines, the NGO Regulations 2017 require the local authorities at the district to issue final decision on whether they will grant the ‘approval’ for the organisation to operate in the district within a maximum of 14 days from the date of the request. If the approval is granted, the DNMC is required under Regulation 42 to sign the MOU with the NGO within a maximum of 14 days from the date of approval of the organisation to carry out its activities in the district.

4. ANALYSIS OF THE LEGAL PROVISIONS

A Government entity does not require an MOU with another in order for the two to cooperate on, or coordinate, activities falling under their respective mandates.

– *Hon. Kiryowa Kiwanuka, Attorney General of Uganda (Excerpt from an advisory on memoranda of understanding dated 5 July 2024)*⁷

4.1. Examining the legality of mandatory MOUs

The provisions of Section 44(a) of the NGO Act which requires NGOs to sign MOUs with local governments in areas of operation are couched in mandatory language. The MOU is not optional, contrary to the aspirations in the 2010 National NGO Policy. Under the Policy, it was envisioned that local government authorities were expected to sign MOUs with NGO partners ‘as may be appropriate’ to ‘guide management of programs or projects jointly implemented with the NGOs/CBOs.’

Under the NGO Act, 2016, the obligation is mandatory. All NGOs registered in Uganda are legally required to seek the approvals and sign MOUs if they are to carry out their activities, or renew their operating permit. This means that despite securing registration status as an NGO and obtaining a valid operation permit, an NGO is not permitted to carry out any activities without complying with this special obligation.

MOUs are by nature voluntary commitments entered on mutual accord. Black’s Law Dictionary, 2nd Ed, defines MOUs as ‘two or more parties expressing mutual accord on an issue as stated on this type of document.’⁸ It is a legal document which explains the preliminary agreement between the parties involved. The legal basis used in the practice of making and implementing MOUs the principle of the freedom of contract. In view of the above, there are fundamental problems with requiring MOUs in mandatory terms as a pre-condition for the exercise of the inherent freedom of association.

There are also legal concerns with requiring NGOs to enter into mandatory MOUs with one of their regulators. Under Section 44(a) of the NGO Act 2016, the approval of the DNMC is a requirement for signing of any MOU with the local government. Under Section 20 of the NGO Act 2016, the DNMC has extensive regulatory, advisory and monitoring powers on the registration and operations of NGOs and CBOs. In his July 2024 Advisory Circular on MOUs, the Attorney General observed;

⁷ Click to read the full Advisory:

<https://chapterfouruganda.org/sites/default/files/downloads/Attorney-General-Advisory-on-MoUs.pdf>

⁸ The Law Dictionary, Memorandum of Understanding (MOU) definition & legal meaning, <https://thelawdictionary.org/memorandum-of-understanding-mou/>

*'[T]here is no legal basis or justification for a Ministry, local government or any other statutory or regulatory authority entering into an MOU with a private entity that the Ministry, local government or statutory authority is by law mandated to regulate or facilitate. Technically, such an MOU, whose purpose and effect is to create between the regulator and the regulated a non-arm's length relationship, is unlawful.'*⁹

It is apparent that the aim of the framers of the provision was to strengthen and promote mutual partnership between NGOs and local governments. The guidance provided by the Attorney General in the July 2024 Advisory Circular is instructive. He observed, 'a government entity does not require an MOU with another in order for the two to cooperate on, or coordinate, activities falling under their respective mandates.' He went further to note that his Office shall not be advising signing of such MOUs (with a few exceptions provided for in law) and that where the entities must document their commitments, they should do so 'through usual official correspondence, minutes or records of meetings, etc.'

One of the exceptions is local governments signing MOUs with NGOs pursuant to Section 44(a) of the NGO Act 2016 and Regulation 42(1) of the NGO Regulations 2017. In the exercise of this exception, the Attorney General now requires that all draft MOUs must be submitted to his Office for review and approval before signing. This adds an extra layer of bureaucracy, which is likely to delay processes further.

4.2. Litigating against mandatory MOU obligation: Missed opportunity?

Section 44(a) of the NGO Act 2016 has been challenged in court. In *Centre for Public Interest Law (CEPIL) v Attorney General, Constitutional Petition Number 20 of 2019*, the petitioners contended that the impugned section was inconsistent with Articles 8A, 21 and 38(2) of the Constitution insofar as it imposes unnecessarily burdensome, discriminatory and unconstitutional restrictions on NGOs' operations without corresponding restrictions in respect of other corporate entities that are incorporated under the Companies Act, 2012.

On April 2, 2022, the Constitutional Court ruled against the petitioners and found that Section 44(a) of the NGO Act 2016 was constitutional. Court held that the section seeks 'to avert real risks', it 'targets a pressing and substantial issue', averts 'duplication of NGOs' activities in the same localities with little or no presence in other areas', and underscores 'due ownership of their programs by the communities within which they operate.'¹⁰ It is our hope that this paper re-centres this conversation and exposes the unconstitutional effect of the mandatory MOUs on the freedom of association.

⁹ Link to the full Advisory:

<https://chapterfouruganda.org/sites/default/files/downloads/Attorney-General-Advisory-on-MoUs.pdf>

¹⁰ Link to the case:

<https://www.ngobureau.go.ug/sites/default/files/news-notices/2023/04/Press%20Release%20%20NGO%20Bureau%2028%2004%202023.pdf>

5. PRACTICE CONCERNS AND IMPLICATIONS

Finally, it must be underscored that any MOU entered into, whether with a foreign or domestic entity, without the prior advice or approval of this Office shall be null and void. Further, non-compliance with the law may attract criminal and/or civil actions [liability] against the breaching public official as previously observed by courts of law.

– Hon. Kiryowa Kiwanuka, Attorney General of Uganda (Excerpt from an advisory on memoranda of understanding dated 5 July 2024)¹¹

5.1. Inordinate delays

NGOs have encountered inordinate delays in the MOU process spanning over six months in many incidences in contravention with Regulation 41 and 42 of the NGO Regulations 2017, which provides for a maximum period of twenty-eight (28) days. NGOs further face bizarre demands for explanations why MOUs must be signed, demands for illegal payments to allegedly facilitate DNMC sittings to obtain MOU approval minutes, and adoption of irregular processes during consideration of MOU requests from NGOs.

Many NGO leaders have repeatedly reported their frustrations in navigating the processes of securing MOUs with their local government authorities. These processes include writing a cover letter requesting for the MOU, submission of a file with copies of registration documents and organisational policies, submission of copies of National Identity Cards of the members and directors, and site visit by an officer from Internal Security Organisation (ISO) and community development office.

After these preliminary processes have been concluded, the DNMC must convene to review the file and if no member has an objection, a minute is recorded approving the signing of the MOU. During the meeting, the standing and work of the organisation are discussed at length and a decision is made whether the MOU would be signed or not. This protracted process requires an average of six months to have the MOU signed.

This protracted process is attributed to the framing of the law, limited understanding of the law, lack of funding for regular DNMC meetings, and negative rhetoric / attitudes against NGOs. The NGO sector is often viewed as a security threat instead of partners to the government.

5.2. Irregular functioning of the DNMCs

Under the law, the DNMC is composed of seven members including the Chief Administrative Officer (CAO) / City Clerk who shall be the Chairperson, the District

¹¹ Link to the full Advisory:
<https://chapterfouruganda.org/sites/default/files/downloads/Attorney-General-Advisory-on-MoUs.pdf>

Community Development Officer (DCDO), the District Health Officer (DHO), District International Security Officer (DISO), District Education Officer, Secretary for Gender and Community Services, and a representative of NGOs in the district. The functions and powers of the DNMC are to be exercised through resolutions which are to be arrived at through consensus or a vote.

The law envisions that the DISO is simply one of the members of the DNMC, who exercise their powers on an equal basis with the other members during the meetings of the Committee. Despite this legal provision, the practice often places the DISO at a superior position – partly because of the negative rhetoric against NGOs. In many local government jurisdictions, including Kampala, NGOs are required to obtain ‘clearance’ from the DISO in a separate procedure before the DNMC can engage on the matter. This has created another layer of clearance that NGOs must go through, including ensuring physical visits to their offices are conducted.

During the DNMC meetings, the DISO in many cases retains the veto power. If the DISO objects to a request for approval for signing an MOU, the application is likely to drag on for several months. The current procedure has irregularly re-established the pre-NGO Act 2016 era where the head of security in the district [then it was the Resident District Commissioner (RDC)], exercised ultimate control on local government approvals and recommendations for civil society organisations at the district level.

In some districts, including Kotido, other local government leaders unlawfully demand to sign MOUs with NGOs. Other local government leaders, who have no mandate or powers under the law, often demand to review MOUs with an intention to either charge illegal fees or frustrate attempts by NGOs perceived as critical of official policy to sign MOUs with the local government.

5.3. Charging of illegal fees

NGO leaders have also raised concerns about demands for payments of illegal fees to ‘facilitate’ inspection of NGO office premises and ‘sitting’ allowances for the DNMC. The DNMC meetings are important because they provide a space where a resolution can be adopted approving the signing of the MOU.

Some of these concerns have been raised to the Minister of Internal Affairs during the Quarterly Dialogue Meetings between CSOs and the Ministry. Despite directives from the Ministry and the NGO Bureau for local governments to address these challenges, many organisations continue to experience the challenges – partly due to limited awareness of the law, a culture of impunity, reluctance by affected NGOs to report incidents of demands for illegal fees, and the fact that the DNMC and other local governments are not sufficiently facilitated and staffed to carry out the role. Many organisations are left with no option but to pay the illegal fees to facilitate convening of the meeting to secure the approval minute.

5.4. Implications for NGO organizing

The challenges in securing the approvals and MOUs have resulted in significant hardships for many organisations, particularly during the process of renewing NGO operation permits.

It has complicated the process of rolling out some NGO programs due to lack of MOUs with local authorities, particularly in jurisdictions where local governments insist on issuing MOUs for particular projects instead of an MOU for all programs of an organisation.

Some organisations have had to pay the monthly penalty of Ugx. 2,000,000 for operating with an expired permit because they were unable to apply on time due to delays in obtaining the approvals to have the MOU signed.

On a positive note, the NGO Bureau recognises some of these challenges. In an effort to mitigate the delays and failure to secure the MOUs despite all efforts on the part of the organisations, the Bureau in practice permits organisations to submit a commitment letter to secure and avail the recommendation letter and MOU in due course to allow timely submission of applications for renewal of operation permits.

6. CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion

The mandatory MOU obligation has far-reaching implications for NGO organizing in Uganda. Apart from whittling down the legal effect of registration with the NGO Bureau and grant of operation permit, it creates an unnecessary layer of bureaucracy which imposes an unjustifiable limitation on the exercise of the freedom of association through NGO organizing. It further creates legal complications for both NGOs and local governments arising from entering unnecessary MOUs. NGOs and local governments can cooperate and work together without this mandatory legal obligation. We hope that this paper triggers honest conversations on the mandatory MOU obligation leading to adoption of the recommendations provided herein.

6.2. Recommendations

To the Parliament of Uganda:

- Repeal the requirement for approvals and the mandatory requirement for MOUs under Section 44(a) of the NGO Act, 2016. The law should only encourage MOUs between CSOs and local governments, where necessary, as a discretionary good practice.

To the NGO Bureau:

- While Section 44(a) of the NGO Act 2016 remains in force, the NGO Bureau should exercise its regulatory powers judiciously to facilitate renewal of NGO permits and operations.
- Continue engaging local government authorities to guide on operations of the DNMCs for expeditious approvals and signing of MOUs.

To Local Government Authorities:

- For the period when the law still requires signing of MOUs, comply with Regulations 41 and 42 of the NGO Regulations 2017 which require requests for approval and signing of MOUs with NGOs to be processed and concluded within a maximum of twenty-eight (28) days from date of first request.

- Local government authorities across the country should treat CSOs as partners in development and stop the harassment and charging of illegal fees during the process of seeking approvals and MOUs. Local government officials implicated in incidents of abuse should be held to account.

To Civil Society / NGOs:

- NGOs that face challenges in complying with Section 44(a) of the NGO Act should document their experiences and report to relevant authorities and agencies.
- Pursue advocacy engagements to push for the repeal of Section 44(a) of the NGO Act 2016 to end the mandatory MOU requirement.



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