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The Law on the Government: 15 years in the making



March 2022

KOSOVO 2.0

INSTITUTI GAP
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This analysis was originally written in Albanian.

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Introduction

The draft Law on Government was approved at the 52nd meeting of the Government of Kosovo, held on December 29, 2021.¹ This draft law has been part of the legislative agenda since 2008 and has been already approved several times by the Government, however, it has never received the final approval of the Assembly of Kosovo.

Until 2008, the functions of the executive branch were governed by UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo. The Constitution of Kosovo, which entered into force on June 15, 2008, established the general principles and authorities of the Government and its members.²

Through an internal regulation, which has been subject to amendment several times, the Government has established areas of administrative responsibility for the Office of the Prime Minister and ministries.³

While the UNMIK Regulation limited the number of ministerial posts to the executive branch, the Constitution of Kosovo provides that the number of ministries shall be determined by an internal government act.⁴ It is precisely the number of ministerial posts and positions related to such posts that has been subject to various forms of abuse by different governments.

The Constitution states that 'The Government of Kosovo exercises the executive power in compliance with the Constitution and the law.' Pursuant to such wording, all governments have made efforts to pass a special law on government.

In this policy brief, GAP Institute will provide a short historical background of efforts to pass a Law on the Government, the content of such draft laws, and the legal dilemmas in determining the number of ministerial posts by law. In addition to the historical perspective and examination of legal documents, this brief provides an overview of one of the problems that has plagued most governments in Kosovo, namely, the large and unsubstantiated number of posts of deputy prime ministers, ministers, deputy ministers, and policy advisers.

1 Office of the Prime Minister of the Republic of Kosovo. Decision No. 02/52, dated December 29, 2021. Source: <https://bit.ly/3FHiAF1>

2 Official Gazette of the Republic of Kosovo. Constitution, Chapter VI. Source: <https://bit.ly/3lzFXIV>

3 Official Gazette of the Republic of Kosovo. Regulation (GRK) – No. 02/2021 on Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries Source: <https://bit.ly/3AcFltZ>

4 Article 96, item 2, Constitution of Kosovo.

The need for a better government structure

In the first months after the declaration of independence in 2008 and entry into force of the new Constitution, the need arose to improve the design of the Government and respective portfolios. For this purpose, the incumbent Ministry of Public Services, with the support of donors, in April 2008, rolled out the Functional Review and Institutional Design of Ministries (FRIDOM) project, where GAP Institute was one of the implementing partners.

According to this project, 'Kosovo administration was built in an ad-hoc manner. Some ministries have overlapping responsibilities, other ministries have a structure that is not appropriate for their scope, and human resources are not allocated where they are really needed. This affects the functioning of the administration and its capacity to meet important priorities for the country.'⁵

Further, FRIDOM project held that compared to other countries in Europe, similar to Kosovo in terms of population and territory, Kosovo has a large number of ministries and that in order to improve coordination, increase efficiency, and reduce costs, the number of ministries should be reduced. In 2008, when FRIDOM project made these assessments, the Government of Kosovo consisted of 18 ministries. There were five different ministries covering the area of economic development, while in other European countries this field was covered by two or three ministries.

Attempts to pass a Law on the Government

FRIDOM provided a draft of the Law on the Government, which was submitted to the Government in December 2008. The first draft of the Law on the Government, produced by the FRIDOM project, provided for the appointment of ministers without portfolio. Under the proposal, not all ministries would have deputy ministers. Deputy ministers would be appointed only in those ministries which cover a wide range of activities. The draft law stipulated that the Prime Minister could appoint up to five policy advisors, up to three deputy prime ministers, two to four ministers, and not more than two ministers without a portfolio. The exact number of policy advisors for each ministry is determined by the Government.⁶

In February 2009, the Government established a Governmental Working Group to align positions and finalize the draft Law on the Government.⁷ This Working Group introduced radical changes to the draft Law on the Government, adapting it to the existing government design of that time. Accordingly, with the draft Law on the Government, which was approved in April 2009,⁸ the number of advisers to the Prime Minister was determined to be up to ten, deputy prime ministers and ministers could appoint up to five advisors, and the restriction that deputy ministers be appointed only to those ministries covering a wide range of activities was removed, but the possibility for each ministry to have deputy ministers was left open.⁹ However, this draft Law failed to pass muster at the Assembly of Kosovo, on grounds that it lacked the required financial impact assessment.¹⁰

5 FRIDOM. Comprehensive Government Review – Preliminary Report with 20 suggestions to improve the design of the Government of Kosovo and its portfolios. November 2008.

6 Gap Institute. GAP Monitor No. 2. February 2009 Source: <https://bit.ly/34WQPM4>

7 Government of the Republic of Kosovo. Decision No. 03/54, dated February 13, 2021. Source: <https://bit.ly/3gLOqHj>

8 Government of the Republic of Kosovo. Decision No. 26/61, dated April 24, 2021. Source: <https://bit.ly/3Bh3XaE>

9 Gap Institute. GAP Monitor No. 4. April 2009. Source: <https://bit.ly/3GLfe4j>

10 Gap Institute. GAP Monitor, August 2011. Source: <https://bit.ly/3Jhrco2>

Following snap parliamentary elections in late 2010, the new Government approved the draft Law on the Government for the second time on August 17, 2011.¹¹ There were no limits on the number of deputy prime ministers, ministers, ministers without portfolio, and deputy ministers in this draft of the law either. The new draft, unlike the 2009 draft, further increased the number of policy advisors. According to this draft, the Prime Minister was allowed to appoint up to 12 policy advisors, while deputy prime ministers and ministers up to six advisors. This draft law passed the first reading in the Assembly of Kosovo and remained there until the dissolution of institutions and subsequent snap election.

The Draft Law on Government was part of all legislative agendas spanning seven years, from 2015 to 2021.

Opinion of the Venice Commission

In 2019 and 2020, there were more serious efforts to pass a Law on the Government. Following approximation, in July 2020, public consultations on the new Draft Law on the Government were opened. The draft law introduced limits on the number of ministerial posts, with maximum three posts of deputy prime ministers and maximum 15 ministries.

However, before it was approved by the Government and forwarded to the Assembly, the Government submitted a request to the Venice Commission to clarify two main issues: the constitutionality of setting out the maximum number of ministries, and to what extent the powers of the Outgoing Government may be restricted until a new government is elected.

In December 2020, the Venice Commission responded to the Government of Kosovo. In the opinion of the Venice Commission, the Law on the Government cannot determine the number of ministerial posts, as this is contrary to the Constitution of Kosovo, which provides that the number of members of the Government is determined by an internal act of the Government.¹²

The Venice Commission recognizes the fact that one of the key reasons for approving a special law on the executive branch stems from concern and pressure by the civil society to limit the number of ministerial posts. However, according to the Commission, this can only be done if Article 96.2 of the Constitution of Kosovo is amended.

According to the Venice Commission, what can be done with the Law on the Government is to introduce criteria of necessity which define the circumstances where a ministerial post may be added. To increase the number of ministries, the Government must provide a rationale for the need to establish a ministry and the goals that are to be achieved, while observing the principles of efficiency, effectiveness, and proportionality.

In addition, the Venice Commission considers that the language used in the Draft Law on the Government is merely descriptive of how the Government currently operates as opposed to prescribing how it should operate. In general, the Commission held that the Draft Law contains largely non-normative language and, in many cases, simply repeats entire provisions which are already in the Constitution or in other laws. This may be problematic in cases where the repetition of provisions from other legal acts is incorrect, and it risks giving rise to legal uncertainty. The Commission recommends the removal of all such repetitive provisions from the Draft Law.

¹¹ Government of Kosovo. Decision No. 02/33, dated August 17, 2021. Source: <https://bit.ly/3gLKTrI>

¹² Venice Commission. CDL-AD(2020)034-e: Kosovo – Opinion on the Draft Law on the Government, endorsed by the Venice Commission on 11 December 2020, adopted at its 125th online Plenary Session (11–12 December 2020). Source: <https://bit.ly/3GRF4nc>

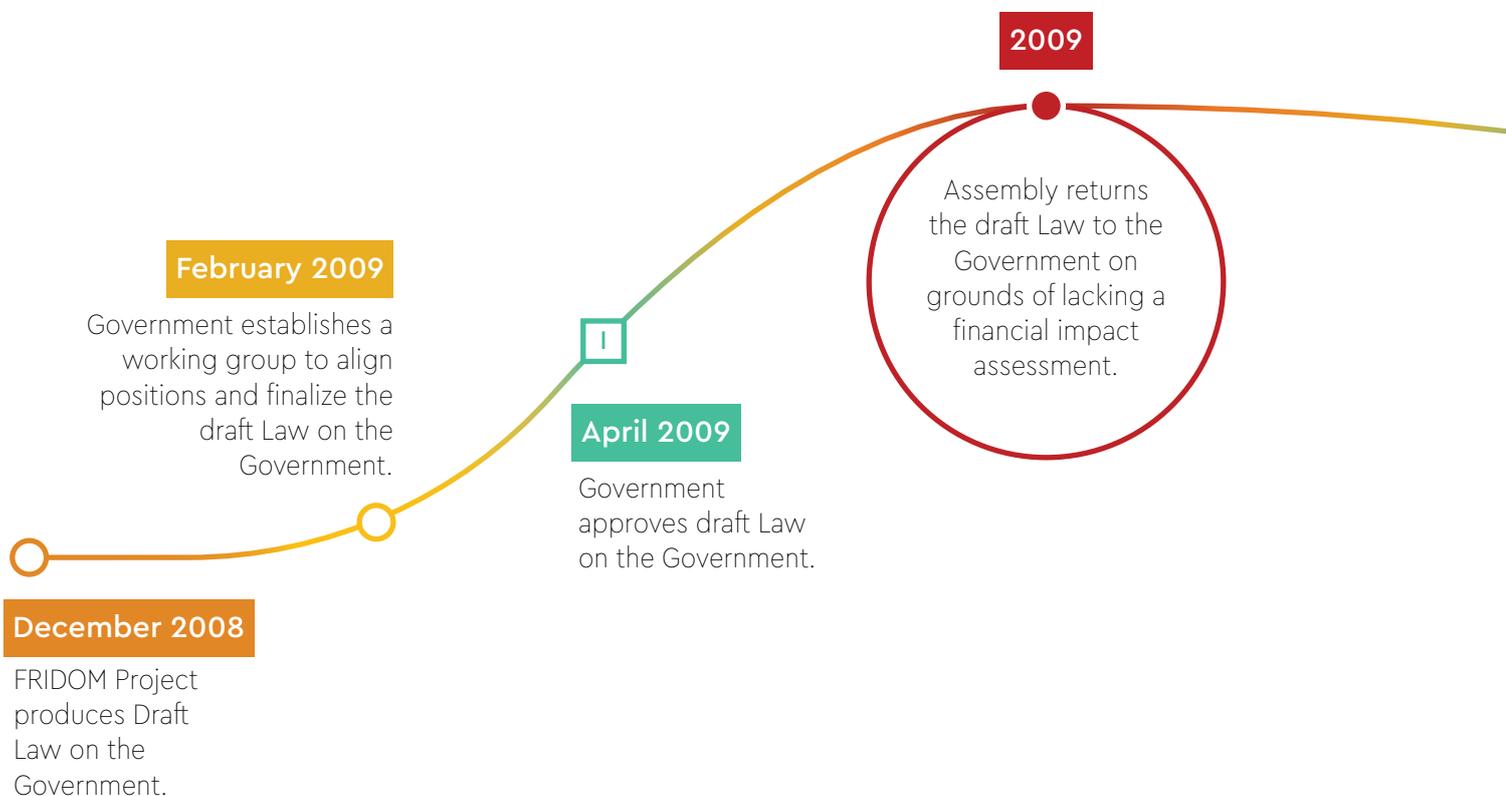
Latest version of the draft Law on the Government

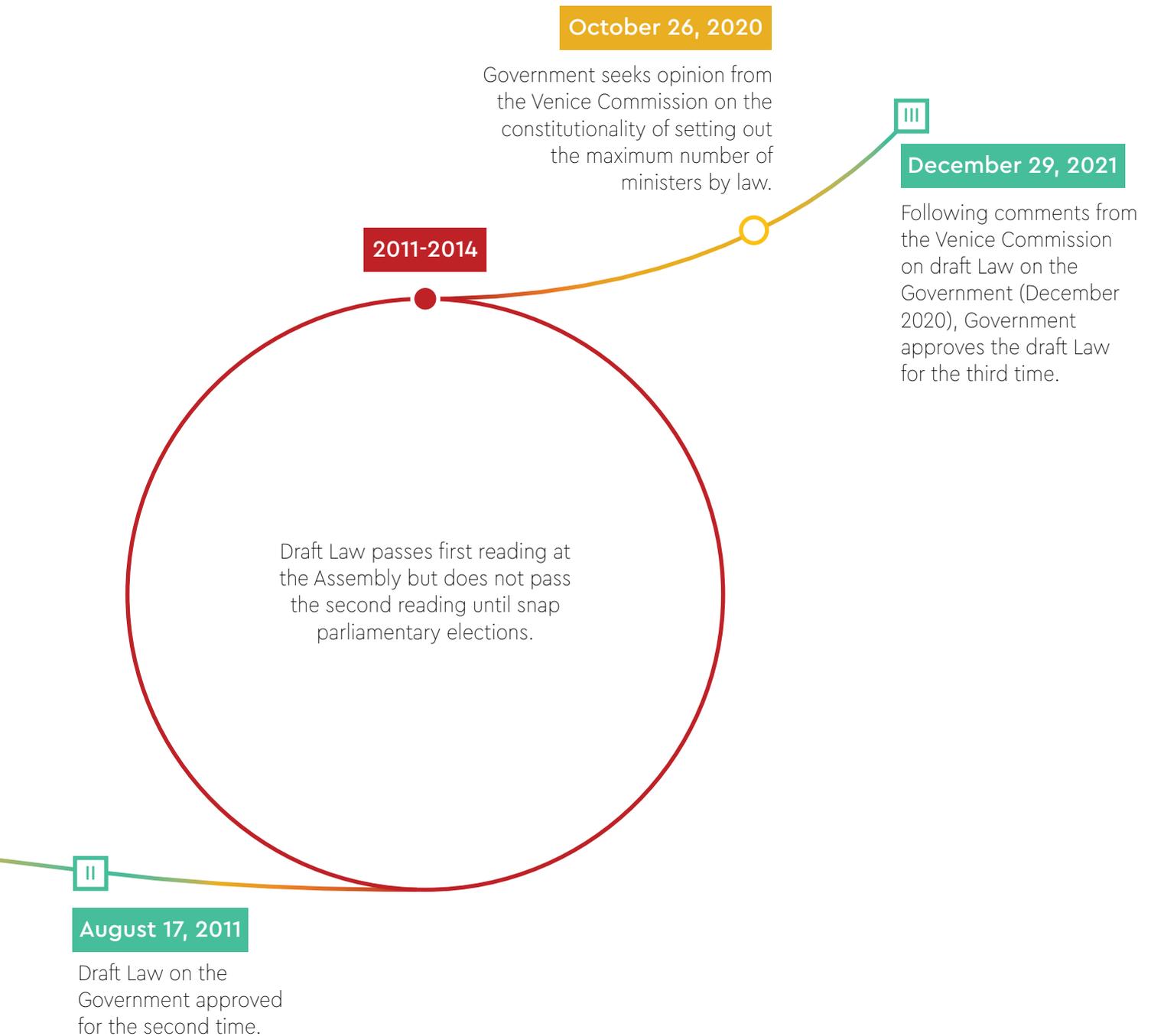
After receiving the opinion of the Venice Commission on December 29, 2021, and for the third time since 2009, the Government approved the draft Law on the Government. On January 11, 2022, the draft Law, together with the Explanatory Memorandum and other required accompanying documents was submitted to the Assembly of Kosovo.

The new draft Law, in line with the opinion of the Venice Commission, does not provide for any limits regarding ministerial posts. Article 4.5 of the Draft Law states that "The number of members of the Government is justified by meeting the criteria of necessity, including in particular the program of the Government and its complexity, economic efficiency, effectiveness, value for money, prevention of surplus and proportionality." This wording derives from the opinion of the Venice Commission. However, there is no further explanation provided as to how this will be done – whether there will be a written assessment, which will be made public and present in detail the Government's arguments for increasing the number of ministerial posts, or merely left to the authority of the Prime Minister to decide at his/her discretion.

Chart 1.

A chronology of the Law on the Government





Pursuant to the proposal of the Venice Commission, the most recent Draft Law also includes new wording on gender representation at the Government. Article 4.2 of the Draft Law states that "The composition of the Government of Kosovo is based on equal gender representation in accordance with the Constitution and applicable legislation."

However, even with the new Draft Law, the problems noted in the opinion of the Venice Commission have not been redressed, because the Draft Law on the Government is largely descriptive, repeats provisions which are already in the Constitution or in other laws, and contains non-normative language. As such, by and large, the Draft Law will not, apart from the new requirement to observe gender equality, alter anything in terms of how the Government operates.

Abuse with ministerial posts

One of the reasons why it was considered necessary to pass a special law on the Government is the fact that all governments, without distinction, have abused the discretion guaranteed by the Constitution to appoint deputy prime ministers, ministers, deputy ministers, policy advisers, and other support staff.

Notwithstanding that the (FRIDOM) project implemented by the Government in 2008 identified as a problem the large number of ministerial posts and unnecessary expenditures, still, the number of ministerial posts and expenditures have been steadily increasing, except for the last two years where the number of ministries has dipped to the 2005 level.

Table 1. Number of ministerial posts since the first governing term in 2001

	2001	2002	2004	2005	2008	2010	2011	2014	2015	2019	February 2020	June 2020	2021
Minister	9	10	13	15	17	18	19	20	19	21	15	15	15
Deputy Minister	0	0	26	30	34	36	38	39	50	80	33	49	26
Deputy Prime Minister	0	0	1	1	2	2	6	5	3	5	2	4	3

Ministerial posts have served more as a form of rewarding governing coalition partners, party members, and interest groups, rather than as institutions performing a specific duty. This fact has also been subject to criticism in the European Commission reports on Kosovo. The EC Kosovo 2019 Report states that "The trend of appointing excessive numbers of deputy ministers, sometimes without clear attributions of roles, continued. There are currently around 80 deputy ministers. This continues to undermine the government's credibility, coherence and effectiveness."¹³ The same observation was made in the 2018 Report, where the Government was asked to consider imposing a cap on the size of the Government.¹⁴

Such a large number of ministerial posts has also created unnecessary expenditures. In October 2019, based on the promises of coalition partners, Lëvizja Vetëvendosje (Self-Determination Movement) and Lidhja Demokratike e Kosovës (Democratic League of Kosovo), during the election campaign to reduce the size of the Government, GAP Institute had calculated that, for a full government term, savings could reach EUR 15.5 million.

¹³ European Commission. Kosovo 2019 Report. Source: <https://bit.ly/3JoyFSa>

¹⁴ European Commission. Kosovo 2018 Report. Source: <https://bit.ly/3sCEODA>

Chart 2. GAP Institute infographic on savings from purging some ministerial posts

15.5 million euro savings

in a four-year term if the new government keeps its promise to reduce the number of ministerial positions

Posts	Government PAN	Promises VV+LDK
Deputy prime ministers	5	2
Ministries	21	12
Deputy ministers	80+	24
Advisors to Prime minister	24	10
Advisors to Deputy prime ministers	43	12
Senior advisors to ministers	21	12
Advisors to ministers	126	72
National coordinators	4	0

Savings in a 4 year term



Conclusion

Since 2008, the draft Law on the Government has been approved three times by the Government and read twice by the Assembly of Kosovo but has never become law. The efforts of various governments to pass a special Law on the Government rise from the wording in Article 92.2 of the Constitution that "The Government of Kosovo exercises the executive power in compliance with the Constitution and the law," as well as the constant pressure by the civil society to limit the number of ministries.¹⁵

However, the wording in the Constitution that "The number of members of Government is determined by an internal act of the Government," as well as the opinion of the Venice Commission, which considers that limiting the number of ministries by law is a violation of the Constitution, have contributed to the perception that the Law on the Government is not an important law. The matter that is expected to be governed by the Law on the Government is easily covered by the Government Regulation on Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries, alone.

The draft Law on the Government, which was approved at the end of 2021 and submitted to the Assembly, largely repeats provisions of the Regulation on Areas of Administrative Responsibilities of the Office of the Prime Minister and Ministries, as well as of the Constitution of Kosovo. The only novelty that is included in the current draft Law is the incorporation of obligations arising from the Law on Gender Equality, and equal representation of women and men in ministerial positions. In the current Government, women are in charge of 33% of the ministries and hold 23% of deputy ministerial posts.

Since there is broad consensus that a special law on the government is a constitutional obligation arising from Article 92.2 of the Constitution, then the final version of the Law on the Government should provide in greater detail what criteria should be followed when establishing a new ministry.

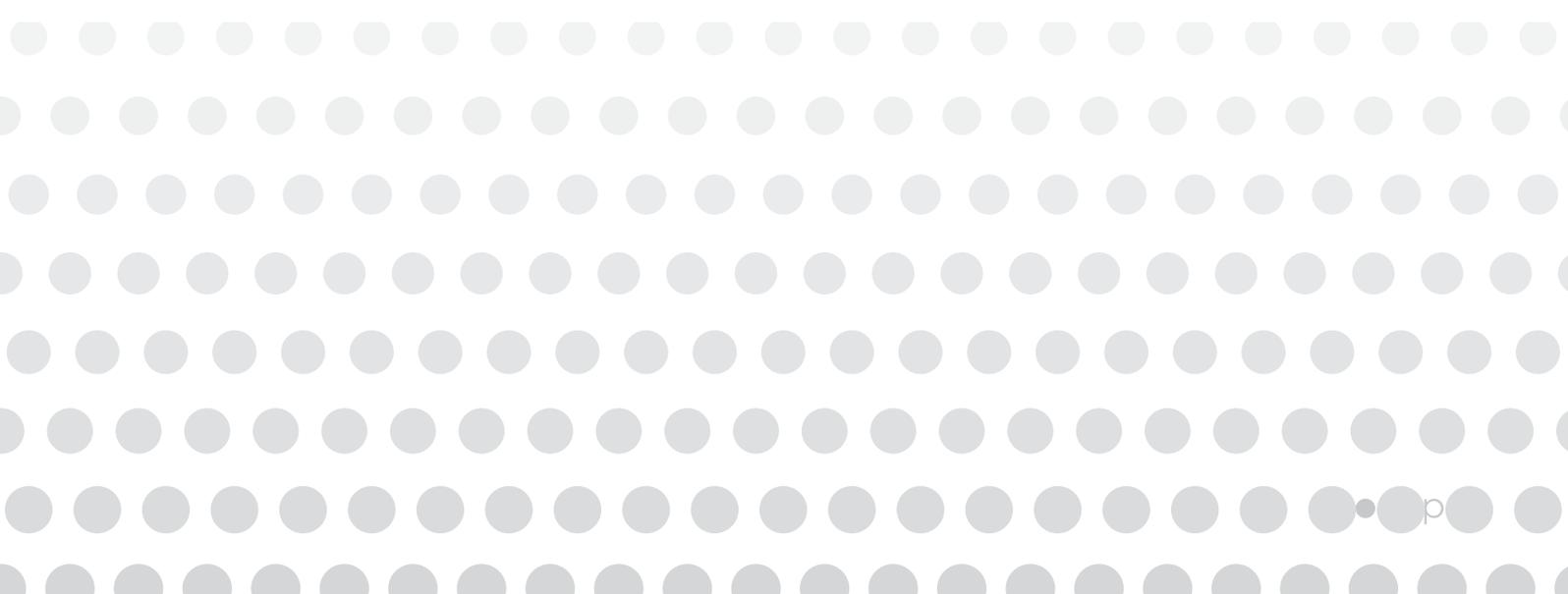
During the reading of the draft Law in the Assembly, it should be considered to add provisions following item 5 of Article 4, requiring that, before establishing a new ministry, the Government should draft an Explanatory Memorandum on the rationale for establishing a new ministry and the benefits it may bring to the nation; further, conduct a Financial Impact Assessment, including detailed breakdown of the number of deputy ministers, policy advisers, and other cabinet staff, number of civil servants, wages and other costs, facilities required to operate, and relationship with other ministries. In addition, before making the final decision, the Government should hold public hearings with the civil society, as well as formally present arguments to the functional parliamentary committee that will oversee the work of the new ministry. For example, if there is a new ministry that covers any aspect of economic development, then the Government should formally present its rationale to the Parliamentary Committee on Economy, Industry, Entrepreneurship and Trade.

These steps are easier to follow when a government in power decides while in mandate to add one or more ministries. In the cases after elections, when a new government wants to increase the number of ministries compared to the previous government, it should present a detailed explanation to the parliament, before the new government is voted.

¹⁵ GAP Institute has called for the number of ministries to be fixed by law, in several different publications starting from 2011 through various editions of the GAP Monitor (Source: <https://bit.ly/3uYVNTs>). In July 2014, in a brief entitled "Government Re-Design" (Source: <https://bit.ly/3BAItqJ>) GAP recommended reducing the number of ministries to 13, by providing an examination of financial savings and giving recommendations on how to merge ministries.



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