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Judicial Norm-Creation Beyond Legislative Intent: The Albanian Courts' Expansive Interpretation of the Domestic Violence Act After the Amendments

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Abstract

This article examines a significant yet underexplored tension within Albanian domestic violence law: the divergence between the explicit requirements of Law No. 11/2026, *On the Prevention and Protection against Violence against Women and Domestic Violence*, and the judicial practice of courts of first instance. Following legislative amendments that narrowed the scope of protected persons by introducing a cohabitation requirement—namely, that certain categories of relatives must share the same household in order to qualify for legal protection—Albanian courts have continued to issue protection orders in cases where this statutory condition is not satisfied. The article argues that such judicial practice effectively creates an extra-statutory legal norm *contra legem*, thereby exceeding the permissible limits of judicial interpretation. Through a systematic doctrinal analysis of the relevant legislation, comparative examination of obligations arising under the Istanbul Convention and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and a critical assessment of judicial reasoning, the article demonstrates that, although the courts' protective approach may be normatively commendable, it lacks a sufficient basis in positive law. The article further contends that the existing gap between legislative intent and judicial application raises important concerns regarding legal certainty, the separation of powers, and the rule of law. It concludes by offering recommendations directed both to the judiciary and to the Albanian legislature, aimed at ensuring coherence between domestic legal norms and Albania's international obligations in the field of protection against domestic violence.

Keywords: domestic violence; Albanian law; judicial interpretation; *contra legem*; residential unit; Istanbul Convention; protected subjects; norm creation.

1. Introduction

The relationship between legislative text and judicial application is never simple, but it acquires particular urgency in the field of domestic violence law, where interpretive choices carry direct consequences for the safety and legal standing of vulnerable individuals. In Albania, the recent legislative amendments to the domestic violence framework —

culminating in Law No. 11/2026 "On the Prevention and Protection against Violence against Women and Domestic Violence" — have introduced substantive changes to the circle of persons entitled to protection. Chief among these changes is the conditioning of protection, for certain categories of relatives, on the existence of a shared residential unit (njësia e banimit) between the victim and the alleged perpetrator.

Notwithstanding the clarity of this legislative choice, courts of first instance in Albania have, in a discernible pattern, continued to issue protection orders in situations where the cohabitation requirement is manifestly not satisfied. In doing so, these courts have effectively substituted their own normative judgment for that of the legislature, producing what this article terms an "artificial norm" — a judicial rule without statutory foundation. This phenomenon raises fundamental questions of constitutional law, judicial methodology, and the rule of law. Is what the courts are doing a legitimate form of teleological or purposive interpretation? Or does it cross the boundary into judicial lawmaking, in violation of the separation of powers? And if the legislative narrowing is itself in tension with Albania's international human rights obligations — particularly under the Istanbul Convention and CEDAW — what is the appropriate remedy?

This article proceeds as follows. Section 2 sets out the legislative framework, tracing the evolution of Albanian domestic violence law and the significance of the amendments. Section 3 examines the concept of the residential unit as the pivotal normative threshold. Section 4 analyses the judicial practice at first instance. Section 5 situates the Albanian framework within the international human rights architecture. Section 6 offers a doctrinal critique of the courts' approach. Section 7 presents conclusions and recommendations.

2. The Legislative Framework: Law No. 11/2026 and Its Predecessors

2.1 Evolution of the Albanian Domestic Violence Framework

Albania's legislative response to domestic violence has evolved considerably since the adoption of the first dedicated statute in 2006. The normative trajectory reflects both internal social pressures and Albania's progressive integration into the European human rights architecture, most notably through its ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the "Istanbul Convention") in 2013.

Earlier iterations of the domestic violence statute cast a relatively broad net of protection, covering a wide range of persons connected by family or quasi-family ties, without imposing a strict cohabitation requirement as a condition of eligibility. The legislative philosophy was one of expansive protection: the law sought to reach the maximum possible range of family relationships within which domestic violence might occur. The amendments introduced by Law No. 11/2026 represent a partial but significant departure from this philosophy. While maintaining broad protection for core family members — spouses, former spouses, partners in cohabitation — the law has introduced differentiated criteria for more extended family categories, notably siblings and in-laws.

2.2 The Textual Structure of Article 12

Article 12 of Law No. 11/2026 defines the protected subjects within the domestic violence framework. The provision draws a material distinction between two categories of relatives:

The first category — covered under sub-paragraph (b) — encompasses brothers and sisters, including, where applicable, their spouses or cohabitants. This category does not, on the face of the text, include an express cohabitation requirement.

The second category — covered under sub-paragraph (dh) — encompasses the brothers and sisters of the spouse or cohabitant, but only if they are members of the same residential unit ("nëse janë anëtarë të njësisë së banimit"). Here, the cohabitation condition is explicit and unambiguous.

Read together, these provisions reveal a deliberate legislative structure: protection is extended to certain extended family members only on the condition that they share a common household. The legislature's choice to articulate this condition explicitly in sub-paragraph (dh), while omitting it (or treating it as implicit) in sub-paragraph (b), is normatively significant and cannot be disregarded through interpretation.

3. The Concept of "Residential Unit" as a Normative Threshold

3.1 Statutory Definition

Article 5(gj) of Law No. 11/2026 provides an authoritative statutory definition of the term "residential unit" (njësia e banimit):

"Residential unit' is a dwelling or any environment used and adapted as such, regardless of whether it is owned by or in use of the family."

This definition is functional rather than proprietary: it focuses on the actual use of a space as a living environment, not on formal ownership or legal title. A residential unit exists wherever persons habitually share a domestic living space, regardless of the legal basis on which they occupy it. Rented accommodation, informal settlements, and shared family homes are all capable of constituting a residential unit for the purposes of the statute.

3.2 The Cohabitation Requirement: Substance and Rationale

The systematic interpretation of Article 12 and Article 5(gj) leads to a clear normative conclusion: for those family members covered by sub-paragraph (dh) of Article 12, the qualifying condition for the domestic violence regime is not merely the existence of a biological or affinal tie, but the fact of actual cohabitation within a shared residential unit. This requirement has a sound doctrinal rationale. The concept of domestic violence is rooted in the dynamics of the shared household: the power asymmetries, the intimacy of common living, the difficulty of physical separation, and the ongoing nature of the coercive relationship that proximity sustains. It is the domestic environment itself that

creates the particular vulnerability that domestic violence law is designed to address. Where individuals share no common household, the legal conditions that justify the special protective regime of domestic violence law — including the issuance of emergency protection orders with immediate effect — are not present. Ordinary civil or criminal law remedies remain available, but the *sui generis* domestic violence framework does not apply.

The term "residential unit," as defined by the statute, is therefore not a mere technicality but a substantive eligibility criterion. Its presence or absence in a given case is determinative of whether the court has jurisdiction to issue a protection order under the domestic violence statute.

4. Judicial Practice at First Instance: Pattern and Problematic

4.1 The Emerging Pattern

Notwithstanding the clarity of the legislative text, an observable and documented pattern has emerged in Albanian courts of first instance: the issuance of protection orders under the domestic violence statute in cases where the parties do not share a residential unit and where the putative victim falls within a category — such as subparagraph (dh) — for which cohabitation is an explicit statutory condition of protection. In such cases, courts have proceeded to grant applications for protection orders without making any finding as to the residential unit requirement, or alternatively, by treating the absence of cohabitation as irrelevant to the jurisdictional analysis. The result is the practical expansion of the domestic violence regime beyond the scope defined by the legislature.

4.2 Doctrinal Characterisation: Artificial Norm Creation

The judicial conduct described above is properly characterised as the creation of an artificial norm. An artificial norm, in the sense used in this article, is a rule of decision applied by a court that lacks a foundation in valid positive law — one that the court has, in effect, generated independently of the legislative source from which it purports to derive.

There are several forms of interpretive activity that are entirely legitimate and indeed necessary: purposive interpretation, systematic interpretation, and teleological construction are all recognised tools of judicial reasoning. However, each of these methods is constrained by the principle that interpretation must operate within the semantic boundaries of the text. Where the legislature has expressed a clear and unambiguous condition — as it has done in Article 12(dh) — no method of interpretation can validly dissolve that condition.

To issue a protection order in the absence of the cohabitation requirement is not to interpret Article 12(dh) — it is to replace it with a different rule, one that omits the condition of shared residence. This is not interpretation but judicial legislation. It is *contra legem* in the most precise sense: it operates against the explicit text of the law.

4.3 Possible Justifications and Their Limits

It is possible to identify several arguments that might, in principle, be advanced in support of the expansive judicial approach. Each must be examined and found wanting. First, one might argue that the court's approach reflects a purposive reading: that the purpose of the domestic violence law is to protect victims, and that a strict application of the cohabitation requirement frustrates that purpose. This argument has surface appeal but is ultimately circular. Every statutory limitation can be characterised as frustrating the law's broader purpose when applied to a sympathetic case. The existence of exceptions does not mean that exceptions may be freely created by courts. The legislature, in enacting sub-paragraph (dh), determined that cohabitation is a necessary component of the relevant protected relationship. Courts are not at liberty to substitute their own assessment of what the law should require.

Second, one might argue that the constitutional right to protection from violence (a right recognised in the Albanian Constitution and anchored in the European Convention on Human Rights) requires courts to extend protection even where the statute does not. This argument is more serious but equally unavailing. The constitutional right to protection from violence does not mandate the application of the domestic violence statute in particular; other legal remedies — criminal law, civil injunctions, tort — remain available. The constitutional argument would be relevant only if the legal system as a whole failed to provide adequate protection, not merely because one specific instrument has been legislatively narrowed.

Third, one might argue that the pre-amendment case law, which applied a broader protective standard, should be maintained as a matter of judicial continuity. However, this argument mistakes the status of judicial practice for a source of binding law. When a legislature amends a statute, prior judicial interpretations of the unamended text lose their normative foundation. The new text governs, and courts are bound by it.

5. International Human Rights Standards: The Istanbul Convention and CEDAW

5.1 Albania's Obligations under the Istanbul Convention

Albania ratified the Istanbul Convention in 2013, thereby accepting a comprehensive set of obligations regarding the prevention and prosecution of domestic violence and the protection of victims. The Convention imposes obligations of result: States Parties must ensure that victims have access to effective protection, regardless of the specific legislative mechanism employed.

Article 4(3) of the Istanbul Convention requires that its provisions be secured without discrimination on any ground, including the nature of the family relationship between victim and perpetrator. Article 52 requires that States Parties take the necessary measures to ensure that competent authorities are granted the power to order the immediate removal of the perpetrator from the household. Article 53 addresses restraining or protection orders, requiring that they be available for immediate protection.

The legislative narrowing of protected subjects — particularly the introduction of the cohabitation requirement for certain family categories — may be argued to fall short of these obligations if it results in a gap in protection for persons who face genuine risk of violence from relatives with whom they do not cohabit. The GREVIO monitoring body, which oversees implementation of the Istanbul Convention, has consistently emphasised that the scope of protection must be sufficiently broad to reach all foreseeable configurations of domestic violence.

5.2 CEDAW and the Obligation to Eliminate Discrimination

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Albania, imposes complementary obligations. The CEDAW Committee's General Recommendation No. 35 (2017) explicitly characterises gender-based violence as a form of discrimination and requires States to exercise due diligence in preventing, investigating, prosecuting, and providing reparations for such violence. Legal frameworks must be comprehensive and must not create arbitrary distinctions in the availability of protection.

To the extent that the cohabitation requirement in Article 12(dh) creates a class of women who face domestic violence but are excluded from the statutory protection regime solely because they do not live with the perpetrator, it may give rise to a compliance concern under CEDAW.

5.3 The Appropriate Response

The existence of these international obligations, however, does not validate the judicial approach described in Section 4. The correct response to a potential incompatibility between domestic legislation and international treaty obligations is not unilateral judicial norm-creation. It is, rather, one of two things: either the court applies the international norm directly, where it is self-executing and has been incorporated into domestic law, or — and more appropriately — it refers the matter to the legislature and, where available, to the Constitutional Court.

Courts in Albania do not have the power to rewrite statutes on the basis of their own assessment of international obligations. Where they perceive a conflict between the statute and an international norm, the appropriate response is either a constitutionality referral or a published decision explaining the tension and calling for legislative reform. The silent expansion of statutory scope is neither constitutionally legitimate nor normatively transparent.

6. Doctrinal Critique and the Rule of Law

6.1 The Boundaries of Judicial Interpretation

The Albanian legal system, as a civil law system rooted in the Continental European

tradition, assigns to the legislature the primary role in norm creation. Courts are, of course, not mere automatons: they interpret, they systematise, and they apply general rules to particular facts. Interpretation inevitably involves creative judgment. But creative judgment is not unlimited.

The key distinction, in classical legal theory, is between interpretation *intra legem* (within the law), *praeter legem* (beyond the law, filling genuine gaps), and *contra legem* (against the law, in direct contradiction of the statute). Interpretation *contra legem* is, in principle, impermissible in a constitutional state that respects the separation of powers. The judicial practice described in this article falls squarely into the *contra legem* category. Article 12(dh) does not contain a gap — it contains an explicit condition. A court that issues a protection order in the absence of the required cohabitation is not filling a gap; it is crossing out a condition that the legislature wrote. This is a matter of constitutional, not merely technical, significance.

6.2 Implications for Legal Certainty and Equal Treatment

The practical consequences of artificial norm creation extend beyond the constitutional dimension. Legal certainty — the principle that citizens can know and rely on the law as enacted — is undermined when courts apply rules that differ from the statutory text. Parties who consult the statute to understand their rights and obligations receive a misleading picture of the applicable law.

Moreover, the inconsistency of judicial practice — some courts applying the statute as written, others applying an expanded version — creates unequal treatment of similarly situated persons. Whether a victim can obtain a protection order depends not on the law, but on which court hears the case. This is antithetical to the principle of equal treatment before the law.

6.3 The Structural Problem: A Legislative Failure Transferred to the Courts

It is important to acknowledge the structural context in which the courts have found themselves. The legislative amendments that narrowed the protective scope of the domestic violence statute were enacted against the background of Albania's treaty obligations under the Istanbul Convention. If the legislature, in introducing the cohabitation requirement, failed adequately to consider the compatibility of that amendment with international obligations, then it has, in effect, transferred a legislative problem to the judiciary.

Courts confronted with the gap between the statute's reach and the reality of domestic violence have apparently chosen, whether consciously or not, to bridge that gap through expansive application. While this impulse is understandable — and in individual cases may genuinely serve the interests of justice — it is not a sustainable or principled solution. It creates unpredictability, lacks democratic legitimacy, and may ultimately expose Albania to international criticism for the opacity of its domestic violence legal framework.

7. Conclusions and Recommendations

This article has identified and analysed a significant dysfunctionality in the Albanian domestic violence legal system: the issuance by courts of first instance of protection orders in cases that do not satisfy the cohabitation requirement mandated by Law No. 11/2026 for certain categories of protected subjects. The article has characterized this practice as the creation of an artificial norm *contra legem* and has examined it from the perspectives of legislative interpretation, constitutional law, and international human rights standards.

The analysis leads to the following conclusions and recommendations:

First, courts of first instance must apply the statute as enacted. The cohabitation requirement in Article 12(dh) is a substantive eligibility condition, not a procedural technicality. Its absence is fatal to an application for a protection order under the domestic violence statute for affected categories. Courts that issue orders in disregard of this requirement are acting *ultra vires* and are creating an artificial norm without legal foundation.

Second, where courts perceive a tension between the statute and Albania's obligations under the Istanbul Convention or CEDAW, the appropriate response is to refer the matter to the Constitutional Court or to the legislature through a formal judicial communication. Courts should not silently expand the statute's reach.

Third, the Albanian legislature should urgently review the compatibility of the cohabitation requirement with Albania's treaty obligations. The narrowing of protected subjects achieved by the recent amendments may fall short of the comprehensive protection required by the Istanbul Convention, particularly given the GREVIO monitoring body's guidance on the breadth of coverage required. Legislative reform, rather than judicial improvisation, is the proper vehicle for addressing this concern.

Fourth, the Albanian judiciary as an institution should develop consistent guidance — through the Supreme Court or the School of Magistrates — on the proper approach to the cohabitation requirement and the limits of judicial interpretation in this domain. Doctrinal consistency is essential to the rule of law.

The tension at the heart of this article — between legislative clarity and the protective imperatives of domestic violence law — is not unique to Albania. It reflects a deeper challenge facing legal systems across Europe and beyond: how to reconcile formal legality with substantive justice in a field where the stakes are, quite literally, matters of life and safety. The answer, this article has argued, lies not in courts exceeding their constitutional mandate, but in legislatures discharging theirs.

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