

Legal Violence and (In)Visible Families: How Law Shapes and Erases Family Life in SOGI Asylum in Europe

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ABSTRACT

Studies on the Refugee Convention have paid very limited attention to the notion of family and family rights of asylum claimants in connection with asylum claims based on sexual orientation and gender identity (SOGI). Drawing on the notion of ‘legal violence’, this article demonstrates the injurious cumulative effect that a heteronormative, homonormative and Western-centered formulation and implementation of asylum and refugee law has on SOGI claimants when it comes to intimate and family relationships. By relying on a solid body of primary and secondary data, it explores the invisibility of SOGI claimants and refugees’ families and how that invisibility is normalized by European legal frameworks, such as the Dublin (III) Regulation and Family Reunification Directive. To end this ‘legal violence’ and reconnect asylum systems with the lived experiences of SOGI claimants, a principled approach based on human rights and specifically the right to respect for family life is suggested.

KEYWORDS: asylum, family life, children, SOGI, legal violence, Common European Asylum System

1. LOVE AND MARRIAGE . . . YOU CAN’T HAVE ONE WITHOUT THE OTHER¹

Ideas about love, family life, sexual activity and childbearing are historically and socially produced and differ considerably across societies, communities, sexualities and genders.² Such notions are pervasive in our lives to such an extent that they become ingrained in every aspect of the social and legal fabric. While this much has been well studied, a much more neglected topic is how these notions impact on the international protection system. How do these notions affect asylum claims and their adjudication by public authorities? In particular, what happens when these notions have an impact on

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1 Reference to lyrics of song ‘Love and Marriage’, popularised by Frank Sinatra and Dinah Shore in the 1950s.

2 Weston, *Families We Choose: Lesbians, Gays, Kinship* (1997).

asylum claims based on sexual orientation and gender identity (SOGI)? How are the assessment of membership of a particular social group (PSG), risk of persecution and credibility—all so crucial (and yet problematic) to the current international protection system³—shaped by the intimate and filial relationships of SOGI asylum claimants and refugees?

SOGI asylum matters have been the focus of an increasing number of media pieces, NGO reports, scholarly outputs and judicial decisions over the last two decades.⁴ While focusing to a large extent on the way SOGI asylum claims are adjudicated, there has also been an increasing interest in the social experiences of these claimants and refugees. Much slower has been the investigation of how SOGI asylum claims are dealt with when they involve family and intimate relationships, and childbearing and raising. Some isolated efforts in the field of SOGI asylum have put at the centre of their attention the role of intimate relationships,⁵ as well as childhood,⁶ yet others explore queer ‘relations of care’ and ‘chosen families’ in the context of international protection.⁷ Nonetheless, these remain isolated and partial attempts.

In this article, by focusing on the European context, we attempt to offer a fuller analysis of how ideas about relationships, children and family impact on the way SOGI claims are adjudicated.⁸ It will become clear throughout this article that although legal statutes and guidance are often appropriate and sensitive to sexual, gender and cultural diversity, decision-making practices across Europe fall considerably short of the necessary standards. For example, in Norway, having more than one child or more than one opposite-sex partner have been known to weaken SOGI claims.⁹ In the UK, both the Home Office 2016 Sexual Orientation guidance and the 2011 Gender Identity guidance emphasize many of the issues that campaigners and advocates have raised throughout the years,¹⁰ including that the claimant’s credibility is not necessarily undermined by having had opposite-sex relationships or children. Yet, bisexual claimants are particularly disbelieved if they have children or have been married.¹¹

3 Foster and Hathaway, *The Law of Refugee Status*, 2nd edn (2014).

4 Many of these will be referenced throughout this paper. For an overview of the range of materials in question, see database available at: <https://www.sogica.org/en/sogica-database/>.

5 Held, ‘What Does a Genuine Lesbian/Gay Relationship Look like in the Eyes of Asylum Decision Makers?’ (2017) 44 *Discover Society*; Hersh, ‘Challenges to Assessing Same-Sex Relationships under Refugee Law in Canada’ (2015) 60 *McGill Law Journal/Revue de droit de McGill* 527.

6 Hedlund and Wimark, ‘Unaccompanied Children Claiming Asylum on the Basis of Sexual Orientation and Gender Identity’ (2019) 32 *Journal of Refugee Studies* 257.

7 Ritholtz and Buxton, ‘Queer kinship and the rights of refugee families’ (2021) *Migration Studies*.

8 In this article, we consider children anyone below the age of 18 years, according to the definition enshrined in Article 1 Convention on the Rights of the Child 1989, 1577 UNTS 3.

9 Gustafsson Grønningstær, ‘Establishing a Sexual Identity: The Norwegian Immigration Authorities Practice in Sexuality-Based Asylum Cases (COC Out and Proud, 2017)’, 11, available at www.sogica.org/database/gronningstær-establishing-a-sexual-identity-2017 [last accessed 27 May 2021].

10 Home Office, ‘Asylum Policy Instruction. Sexual Orientation in Asylum Claims. Version 6.0 (Gov.UK, 2016)’, available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf [last accessed 27 May 2021]; Home Office, ‘Gender Identity Issues in the Asylum Claim: Transgender (Gov.UK, 2011)’, available at: www.gov.uk/government/publications/dealing-with-gender-identity-issues-in-the-asylum-claim-process [last accessed 27 May 2021].

11 Lewis, ‘“Gay? Prove It”: The Politics of Queer Anti-Deportation Activism’ (2014) 17 *Sexualities* 958 at 965. Dustin and Held, ‘In or out? A Queer Intersectional Approach to “Particular Social Group” Membership and Credibility in SOGI Asylum Claims in Germany and the UK’ (2018) 5 *GenIUS* 74.

Similarly, the Canadian Guideline on Sexual Orientation and Gender Identity and Expression (SOGIE) asylum claims acknowledge the difficulties SOGIE claimants may face in proving their spousal or conjugal relationships and calls on decision-makers to consider the ‘unique circumstances’ that these claimants face.¹² Nonetheless, it is well known that same-sex relationships are often dealt with inadequately in the Canadian asylum system.¹³ Even more abhorrent practices have been reported in the past, with Bulgarian authorities being accused of considering ‘the marital or parental status of LGBTI applicants [as] sufficient to deny granting refugee protection.’¹⁴ Moreover, as one of our participants told us, women’s experiences of marriage (often forced upon them) and childbearing are recurrently used to undermine their asylum claims:

There is also that problem of . . . if you come from countries where young marriages or forced marriages are common, then you have issues like . . . I mean the recent very prominent case, long on-going case in the UK with Aderonke . . . where her claims of being a lesbian were doubted because she was once married and had kids, but that fails to recognize the local context of the country of origin that in many cases people don’t have a choice. (Jules, staff member at ILGA-Europe).¹⁵

All this happens despite the UN High Commissioner for Refugees (UNHCR) SOGI Guidelines, which so far provide the best guidance for implementing the Refugee Convention through a SOGI lens, clearly stating that having married and/or having children are factors that ‘by themselves do not mean that the applicant is not LGBTI.’¹⁶ Such preconceived ideas of family matters in connection with SOGI claimants will be analysed in light of the theoretical work developed around the notion of ‘legal violence’, i.e. how legal systems inflict violence on individuals’ bodies and minds (Section 2). Against this theoretical background, we draw from a broad documentary analysis of publicly available international, European and domestic case law, policy documents, NGO reports, case files, etc. to question what role the European human rights framework, and specifically the right to respect for family life, may play in this field. Furthermore, we use primary data collected through extensive fieldwork carried out across Europe between 2017 and 2019 within the context of the SOGICA project (Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge), with a focus on the Council of Europe and European Union (EU) institutions, as well as Germany,

12 Immigration and Refugee Board of Canada—IRB, ‘Chairperson’s Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression (IRB 26 April 2017),’ available at: www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir09.aspx [last accessed 27 May 2021].

13 Hersh, *supra* n 5.

14 Śledzińska-Simon and Śmiszek, ‘LGBTI Asylum Claims: The Central and Eastern European Perspective’ (2013) 42 *Forced Migration Review* 16 at 17.

15 The case of Aderonke was widely reported in the media: Dugan, ‘Home Office Says Nigerian Asylum-Seeker Can’t Be a Lesbian as She’s Got Children,’ *The Independent*, 3 March 2015.

16 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/09, at para 63(vi).

Italy and the UK as country case studies.¹⁷ These case studies were chosen on the basis of three factors: the volume of asylum claims, the different adjudication procedures adopted and the socio-cultural-legal context, particularly in relation to SOGI. Fieldwork included: 143 semi-structured interviews with SOGI asylum claimants and refugees, NGOs, policy-makers, decision-makers, members of the judiciary, legal representatives and other professionals; 16 focus groups with SOGI asylum claimants and refugees; 24 non-participant contextual observations of court hearings; and Freedom of Information requests in Germany, Italy and the UK. These methods were complemented by two online Europe-wide surveys of SOGI asylum claimants and refugees and professionals working with them. This mixed-methods approach allowed us to obtain both quantitative and qualitative data, which were fundamental to complement our legal analysis in order to reach a broad and in-depth understanding of the issues in question.

Our fieldwork findings refer specifically to the case studies adopted, so they are not generalizable to all of the European context, but being Germany, Italy and the UK all parties to the European Convention on Human Rights (ECHR) and Member States of the EU when the fieldwork was carried out, we can contextualize the country-level findings within cross-national frameworks and European trends, as will be seen in Section 5. Although the situation and gravity of certain issues differ across the three country case studies, there were strong common themes across all three of them. We have thus opted to analyse the data along thematic lines, rather than from the point of view of different jurisdictions or categories of participants (for example, claimants or decision-makers). This approach allowed for pervasive issues across the asylum systems in question to be identified instead of such issues being understood as isolated matters that only affect certain jurisdictions or are only the opinion of certain actors in the system. This is also why, as we argue here, European human rights law (if correctly interpreted) can play a key role in the definition of appropriate common solutions to such emerging issues.

Our analysis will proceed with an exposition of the theoretical background against which the subsequent analysis will be carried out, namely the body of literature on the 'legal violence' produced by heteronormative and homonormative readings of applicable laws (Section 2). In Section 3, we analyse asylum authorities' expectations in terms of what is 'meaningful' in the context of intimate relationships. In Section 4, we shift the focus to the role of children in this process, and how childbearing and child-rearing in particular have an impact on SOGI asylum adjudication. In Section 5, we look at broader family relationships and how family reunification rules reflect hetero- and homonormative conceptions. In Section 6, we explore scope for improvement and avenues for reform in the current asylum systems, as to reduce drastically the legal violence suffered by SOGI claimants. Section 7 concludes by affirming the urgency to end the legal violence perpetrated on SOGI claimants in the context of family-related matters, as a human rights as well as a social pressing need.¹⁸

17 For full details of the methodology, see Danisi, Dustin, Ferreira, and Held, *Queering asylum in Europe: Legal and Social Experiences of Seeking International Protection on grounds of Sexual Orientation and Gender Identity*, (Springer, 2021) at ch 2, and www.sogica.org/en/fieldwork [last accessed 27 May 2021].

18 Although we refer to SOGI all throughout this article, the bulk of our data and analysis pertains specifically to sexual orientation and only marginally to gender identity, as most of our participants had sexual orientation rather than gender identity related asylum claims.

2. SOGI ASYLUM SYSTEMS AS A FORM OF LEGAL VIOLENCE

The international protection system was set up to alleviate the suffering of those escaping persecution and offering them much needed protection. Yet, the current international protection system is plagued with many shortcomings, which have been documented and analysed.¹⁹ Those shortcomings, reflected in the rules and practices of European and domestic legal systems, trap all claimants in lengthy and Kafkaesque procedures and inadequate socio-economic conditions, affecting SOGI claimants in very particular ways.²⁰ The suffering felt by asylum claimants and refugees is recognized to constitute what can be termed ‘legal violence’.

The notion of ‘legal violence’ is an analytical category that authors such as Menjívar and Abrego have developed drawing on theories of structural and symbolic violence (developed by Bourdieu in particular), which explore the range of actions that have a detrimental effect on social inequality in all its expressions.²¹ Legal violence can thus be understood as a sub-category of the broader notions of structural and symbolic violence to ‘capture the normalized but cumulatively injurious effects of the law.’²² Menjívar and Abrego apply the notion of legal violence to the experiences of Central American immigrants in the USA, by analysing their encounters with the areas of work, family and education. The intertwining of immigration with criminal law leads to migrants simply hoping to survive the ‘hidden and violent effects’ of the law.²³ Whether or not migrants (and refugees, we add) deserve a recognized legal status is thus a legal construct that stratifies, shapes and harms life chances, future prospects and livelihoods.²⁴ This often takes place through less dramatic and less visible forms of injuries—in this case, caused by legal systems—as the scholarship on structural and symbolic violence has highlighted.²⁵ Even when purporting to constitute a fair and balanced system, legal norms on migration (broadly understood) lead to short and long-term harms, preventing many migrants from obtaining a legally recognized status within a reasonable time period, thus undermining their efforts at socio-economic integration.²⁶ These forms of violence are co-constitutive, deprive individuals of their agency and affect not only the individuals directly concerned but also their families and networks in countries of origin.²⁷

Menjívar and Abrego show how the violence caused by the law that governs migratory journeys serves to perpetuate social inequality and rights violations.²⁸ These forms of structural and symbolic violence become normalized and are better understood as ‘legal violence’, as—according to Menjívar and Abrego—they are ‘embedded in legal practices, sanctioned, actively implemented through formal procedures, and

19 For example, Ferreira et al., ‘Governing Protracted Displacement: An Analysis across Global, Regional and Domestic Contexts (TRAFIG Working Paper 3)’ (BICC, 2020).

20 Danisi et al., *supra* n 17.

21 Bourdieu, *Masculine Domination* (1998).

22 Menjívar and Abrego, ‘Legal Violence: Immigration Law and the Lives of Central American Immigrants’ (2012) 117 *American Journal of Sociology* 1380 at 1380.

23 *Ibid.* 1382.

24 *Ibid.* 1383.

25 Jackman, ‘Violence in Social Life’ (2002) 28 *Annual Review of Sociology* 387.

26 Menjívar and Abrego, *supra* n 22 at 1385.

27 *Ibid.*

28 *Ibid.* 1386.

legitimated – and consequently seen as “normal” and natural because it “is the law”.²⁹ The law that regulates the daily movements and lives of migrants is indeed the source of insecurity, suffering and vulnerability, often facilitated by criminal legal tools.³⁰ This is most obvious in instances of family separation, homelessness, detention and deportation, but also takes place in the form of lack of access to certain essential services or goods, like education and food, or the deprivation of certain rights, like the right to work. The end result is a ‘legal system that purports to protect the nation but, instead, produces spaces and the possibility for material, emotional, and psychological injurious actions’, rendering mistreatment ‘uneventful, familiar and legal’.³¹

The notion of legal violence has been applied by Llewellyn to SOGI asylum in the context of the USA.³² Llewellyn concludes that ‘anti-fraud’ legal tools like restrictions to the right to work and shifting procedural timelines lead to specific harmful effects on SOGI claimants, namely isolation and loneliness, prolonged uncertainty, and mental and physical vulnerability. As a consequence, ‘everyday-lived experiences of LGBTQ asylum applicants are filled with trauma and suffering in many ways imposed by the very system that is supposed to protect them.’³³

Our SOGICA participants also clearly saw some elements of the asylum system as violent, even though we did not explicitly ask them any question on this notion. The way accommodation was managed constituted one of the areas of the asylum system where violence was most visible in the form of crowded conditions and exposure to bullying and discrimination, while authorities did little to combat those issues.³⁴ The detention of SOGI claimants stood out as the worst example of legal violence, especially in the UK.³⁵ Moreover, Chiara, an NGO worker in Italy, referred to the procedure an asylum claimant had undergone in the context of a ‘Dublin’ return as a ‘series of instances of bureaucratic violence’,³⁶ and to the poor medical services offered to asylum claimants as a ‘form of violence’. Similarly, Diana, a refugee in Germany, described as ‘violent language’ the questions posed to claimants by the German asylum authorities.³⁷ Diana also described another trans refugee’s experience with a poorly skilled interpreter as ‘violence’:

The translator didn’t even know anything about being a trans person, about operations. And one client got naked (. . .) because the translator didn’t want to understand what operation from man to woman, woman to man, meant. And then it’s totally like violence for a refugee when something like that happens.

The fact that various actors in the asylum system are able to so clearly articulate features of the system as ‘violent’—even when not prompted to use that terminology—makes it

29 Ibid. 1387.

30 Ibid. 1387–1388.

31 Ibid. 1414.

32 Llewellyn, ‘Captive While Waiting to Be Free: Legal Violence and LGBTQ Asylum Applicant Experiences in the USA’ (2021) 18 *Sexuality Research and Social Policy* 202.

33 Ibid. Discussion.

34 Danisi et al., *supra* n 17 at ch 8.

35 Ibid.

36 Guild et al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin—Study for the LIBE Committee’ (European Parliament, 2015).

37 Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF).

all the more striking how violent those features are. That clear articulation also facilitates greater resistance to the violent nature of the system through ‘subtle but powerful ways in which queer and trans migrants navigate, contest, subvert, and resist ideological practices, thus refusing to give into a regime organized to exclude them.’³⁸

In the case of SOGI claimants, legal violence is facilitated by heteronormativity and homonormativity. Indeed, the harmful effects suffered by SOGI asylum claimants result from heteronormative regulatory practices that may not be ‘explicitly homophobic or transphobic in their construction, [but] they are in their consequences.’³⁹ Jung also asserts, in the context of the asylum system, that ‘[l]aw turns out to be a violent governmental technology when gender and sexuality rights are used to further close the border.’⁴⁰ The legal violence produced by asylum systems thus has gendered and SOGI dimensions that need to be articulated and brought to light in more systematic ways, clearly pointing to the linkages between law, policy and practices, on the one hand, and (suffered) trauma and violence, on the other.

A term initially coined by Warner,⁴¹ heteronormativity sets heterosexuality as the norm, in other words, the ‘default’, and relies on static gender roles. As defined by Lubbe, ‘[h]eteronormativity emphasizes the correctness of heterosexual dogmas and traditional family forms while at the same time censuring, punishing, “medicalizing”, and rendering homosexuality invisible in all of its manifestations.’⁴² A heteronormative framing was patent, for example, in the 2015 debates and campaigns surrounding refugee experiences in the Mediterranean, which used as trademark image a man leading a woman holding a (female) child.⁴³ As Carastathis and Tsilimpounidi assert, ‘[t]he “refugee” – whether embraced as a victim or reviled as a threat – is constructed as presumptively heterosexual and as (potentially) reproductive.’⁴⁴ Consequently:

[S]ympathetic representations rely on the heterosexualisation of ‘refugees’— their participation in family and kinship structures makes their loss, grief, or vulnerability legible, as they are gendered variously as courageous but desperate fathers, sacrificing mothers, and innocent children. In hostile representations, ‘refugees’ may be said to embody ‘queer’ or ‘monstrous’ heterosexualities (references omitted).⁴⁵

Heteronormative dynamics in the asylum system are thus beyond doubt.⁴⁶ Simultaneously, one can observe the impact of homonormativity on the asylum system.

38 For example, in the Canadian context, Ou Jin Lee, ‘Responses to Structural Violence: The Everyday Ways in Which Queer and Trans Migrants with Precarious Status Respond to and Resist the Canadian Immigration Regime’ (2019) 10 *International Journal of Child, Youth and Family Studies* 70 at 84.

39 Ibid, Introduction.

40 Jung, ‘Logics of Citizenship and Violence of Rights: The Queer Migrant Body and the Asylum System’ (2015) 3 *Birkbeck Law Review* 305.

41 Warner, ‘Introduction: Fear of a Queer Planet’ (1991) 29 *Social Text* 3.

42 Lubbe, ‘Mothers, Fathers, or Parents: Same-Gendered Families in South Africa’ (2007) 37 *South African Journal of Psychology* 260.

43 Carastathis and Tsilimpounidi, ‘Methodological Heteronormativity and the “Refugee Crisis”’ (2018) 18 *Feminist Media Studies* 1120 at 1121.

44 Ibid.

45 Ibid, 1121–1122.

46 See also Luibhéid, ‘Heteronormativity and Immigration Scholarship: A Call for Change’ (2004) 10 *GLQ: A Journal of Lesbian and Gay Studies* 227.

Homonormativity is a concept that was initially developed by Duggan and is characterized as:

a politics that does not contest dominant heteronormative assumptions and institutions—such as marriage, and its call for monogamy and reproduction—but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.⁴⁷

In the context of asylum, homonormativity can be seen in the way adjudicators impose on claimants certain ideas of what being ‘gay’ is and what ‘gay people’ should do and say,⁴⁸ also on matters related to relationships, children and family. While debating hetero- and homonormativity, kinship and queer scholars have explored to what extent it is possible or desirable for the ‘alternative social worlds’ of queer people to be accommodated by social and legal systems.⁴⁹ Some refute the recognition of ‘household diversity’ and, instead, advocate de-emphasizing ‘family’ altogether and making space for ‘other modes of relating, belonging, caring and so on.’⁵⁰ A broad range of queer possibilities—from polyamory to non-monogamy, from friendship-centered family to children with three parents or more, from community-based kinship to any other possible ‘family of choice’⁵¹—are worth nurturing but also constitute significant challenges to law, policy and society, and the asylum and human rights systems are no exception to this.

Asylum systems thus inflict violence on asylum claimants and refugees in a myriad of ways. This violence is compounded by hetero- and homonormative dynamics in asylum adjudication. By adopting this theoretical lens, in the next sections, we will be able to identify and explore various forms of legal violence inflicted upon SOGI asylum claimants on account of the way asylum systems reflect hetero- and homonormative understandings of relationships, children and family.

3. SHAPING ‘MEANINGFUL’ RELATIONSHIPS THROUGH ASYLUM

As anticipated, several studies on SOGI asylum have already denounced how SOGI claimants have to adhere to specific, culturally framed, narratives in order to avoid disbelief by decision-makers.⁵² These studies have reported cases featuring SOGI claimants who were disbelieved for having been married or having children in the country of origin or in the host country, as well as for not having an ‘immutable’ identity. Whether or not such aspects should be central to a credibility assessment (Section 6),

47 Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism’ in Nelson and Castronovo (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (2002) 179.

48 Danisi et al., *supra* n 17 at ch 7.

49 Freeman, ‘Queer Belongings: Kinship Theory and Queer Theory’ in Haggerty and McGarry (eds), *A Companion to Lesbian, Gay, Bisexual, and Transgender Studies* (2007) 295; Spade, ‘Intersectional Resistance and Law Reform’ (2013) 38 *Signs: Journal of Women in Culture and Society* 1031.

50 Halberstam, ‘Forgetting Family: Queer Alternatives to Oedipal Relations’ in Haggerty and McGarry (eds.), *A Companion to Lesbian, Gay, Bisexual, and Transgender Studies* (2007) at 316-17.

51 Weston, *supra* n 2.

52 Among many others, Jansen and Spijkerboer, ‘Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’ (Vrije Universiteit Amsterdam 2011), at 47 ff; Berg and Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 *Journal of Refugee Studies* 195 at 203 ff.

too often claimants' relationship history is a significant feature in determination hearings.⁵³ The reason may lay in the claimants' account of persecution, when their SOGI became known for living intimate or sexual moments with their (long-term or occasional) partners.⁵⁴ With or without such accounts, decision-makers may also require evidence of past or current intimate relationships to establish membership of a PSG as persecution ground under Article 1(2) of the Refugee Convention.⁵⁵ Independently of whether this information is provided voluntarily or requested explicitly, SOGI claimants are often put under disproportionate pressure to comply with an unattainable standard of proof.⁵⁶ In this context of contestation and invisibility of non-heterosexual relationships, it is not surprising to find out that, according to the UNHCR, many States lack provisions for resettling refugees with a same-sex partner.⁵⁷ Even worse, as the jurisprudence of the European Court of Human Rights (ECtHR) shows, decision-makers have used heterosexual bonds to deny a claimant's risk of being exposed to human rights violations upon return to his country of origin, despite evidence of homophobic violence in that country and the applicant's past same-sex relationships.⁵⁸

In light of this background, this section explores how European asylum systems shape what intimate relationships should look like to be considered 'meaningful' in SOGI claims. Our analysis is not limited to credibility issues, as these explain only part of the violent effects that law, policy and practices have on asylum claimants. As we argue here, some aspects of the asylum procedure as well as accommodation provision mutually reinforce the still widespread heteronormative understanding of family and intimate relationships in credibility assessment. We show how the resulting combined effect of different aspects of the European and domestic asylum systems on SOGI claimants can reach unspeakable, often invisible, forms of violence.

It emerged across the SOGICA country case studies that SOGI claimants are often presumed to be gay men, with no family or intimate relationships, arriving by themselves from their countries. In a clear homonormative approach to asylum, the prototypic SOGI refugee becomes male, partnerless and childless. Leaving aside homogenization concerns⁵⁹ and homonationalist ideas,⁶⁰ our fieldwork provided evidence of the fallacy of such assumptions. Trudy Ann and Veronica, for example, arrived in Germany with their respective partners; Ophelie also reached Scotland with her partner. In Italy, Dev and Fred arrived together after a long journey through sub- and north-Saharan countries. While the lack of legal channels for non-traditional families normalizes the invisibility of such relationships (Section 5), travelling together does not mitigate the risks that migrants often encounter in their journey to Europe. For

53 Hersh, *supra* n 5 at 530.

54 Danisi et al., *supra* n 17 at ch 6.

55 Convention relating to the Status of Refugees 1951, 189 UNTS 150.

56 Danisi et al., *supra* n 17 at ch 7.

57 UNHCR, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees: Discussion Paper*, 22 September 2010, at para 46.

58 *M.K.N. v Sweden* Application No 72413/10, Merits, 27 June 2013. In line with its usual position on credibility assessment, for which 'national authorities are best placed', the ECtHR agreed with the defendant State by denying the risk of violation of Article 3 (non-refoulement) of the ECHR upon return.

59 Danisi et al., *supra* n 17 at ch 10.

60 Akin and Svendsen, 'Becoming Family: Orientalism, Homonormativity, and Queer Asylum in Norway' in Rohde, Braun and Schüler-Springorum (eds), *National Politics and Sexuality in Transregional Perspective: The Homophobic Argument* (2018).

instance, considering that SOGI claimants ‘don’t (. . .) exhibit our characters or what we are’ (Alain A., Italy) during their journey for security reasons, travelling together may increase the risk of being discovered, especially in transit countries with high levels of homophobia and transphobia. That is why, in order to avoid suspicions, Mary and Zaro decided to travel individually to the UK, despite the increased anxiety and distress that such a solution caused them. Despite the mutual support provided during the journey, SOGI claimants may feel forced to deny their relationships upon arrival, either out of fear or owing to traumatizing experiences.⁶¹ In this regard, Alain A. (Italy) and Nice Guy (Italy) each told us about the loss of their respective partners on the high seas during their attempts to reach Europe in makeshift boats. Both were too traumatized to report their partners’ disappearance to the Italian authorities. Nevertheless, decision-makers failed to recognize the reasons for remaining silent in such emotionally painful circumstances. During Nice Guy’s judicial appeal hearing, this silence was used against him to cast doubt on his overall account and credibility, as well as to question the ‘meaningfulness’ of his relationship (Tribunal observation, northern Italy, 2018), in a clear violence against his emotional and psychological well-being.

Yet, when SOGI claimants manifest their existing relationships to national authorities, including at arrival, asylum systems are not able to address their needs in a way that prevents additional suffering or distress. For example, Trudy Ann and her partner were placed in detention when they arrived in Germany.⁶² In such a situation, while border agents applied entry procedures ‘in ways that reinforce state power and justify structural violence,’⁶³ they did not give any weight to their intimate relationship and their pre-migration experience of violence in the reception arrangements offered to them.

Our primary data suggests that several factors contribute to undermining SOGI claimants’ ability to freely live their love and family bonds. Accommodation is a case in point. Because accommodation services across Europe have not been designed to host same-sex couples or to address their needs,⁶⁴ they act as a magnifier of legal violence. Serious difficulties in this respect were reported by our participants, as claimants are asked to provide evidence in order to be considered a couple (Jules, staff member at ILGA-Europe). Only asylum reception staff who have received adequate training are able to avoid a heteronormative mind-set and show willingness to accept unofficial proof and testimonies on SOGI-specific aspects in order to prevent same-sex couples from being separated (Giulio, LGBTIQ+ group volunteer, Italy). Besides, even when a couple is eventually hosted in the same facility, they may not be allowed to share the same room. For instance, when Dev and Fred (Italy) asked to share a room as a couple, their request was refused on the grounds that the facility was designed to only host single (male) asylum claimants. While such a request could have been easily accepted (as the accommodation facility had several shared bedrooms), no consideration was given either to their right to respect to private or family life,⁶⁵ or to the grounds on which they feared persecution. Instead, Dev and Fred were—at least indirectly—asked

61 Alessi et al., ‘Traumatic Stress among Sexual and Gender Minority Refugees from the Middle East, North Africa, and Asia Who Fled to the European Union’ (2018) 31 *Journal of Trauma Stress* 805.

62 See similar accounts in Canada in Lee, *supra* n 38 at 80.

63 *Ibid.*

64 Danisi et al., *supra* n 17 at ch 8.

65 Article 8 ECHR 1950, ETS 140. See Section 6 below.

to keep their relationship invisible to other guests to avoid abuse and discrimination, thus suffering the violence of being forcibly 'closeted'. Similarly, although Veronica and Julia were able to share a room with their two children, they were asked to pretend to be sisters. As Dev pointed out, 'we still feel like in Africa'. Feelings of isolation and distress were evident, especially when it was difficult or impossible to obtain a transfer to another accommodation facility (among others, Stephen and Prince Emrah, Germany), thus compounding the violence of the asylum system for SOGI couples.

The worst point in this process of denial and violence against SOGI claimants' relationships is reached in the context of credibility assessments. Literature suggests that the lack of past or present relationships may result in asylum claims being rejected, while there is a strong correlation between 'credible' intimate relationships and overall credibility of SOGI claimants.⁶⁶ Having this in mind, two different types of assumptions emerged from our data in this respect: one related to past intimate and family relationships and another connected to expectations of intimate relationships in the host country. In both contexts, decision-makers tend to apply their heteronormative notions of love, intimacy, sexuality and family, with clear difficulties in understanding other(s') experiences. No consideration seemed to be given to the violent effects that their approach could have on claimants. As Moses (Italy) put it, 'I haven't even recovered from losing my lover. (...) I just managed to answer all these questions, [but] their judgement is based on how they were able to analyse the story'.

In relation to past love and family bonds, a particularly problematic approach emerged in the UK, which is perhaps surprising in light of the legal protection provided to SOGI minorities in this country in comparison to other European States.⁶⁷ For example, Patti, who self-identified as a bisexual woman, explained that her asylum request was rejected for having married someone of the opposite sex:

I was refused because [the UK] Home Office was saying, oh, if I am a lesbian, oh that I have lived with a man, why should I have lived with a man. But I was telling them the marriage was against my wish, yes. They said, oh, they don't believe that.

Bisexuality disappeared in the Home Office's decision. Reflecting a homonormative approach (in this case the expectation being that 'true' members of SOGI minorities do not marry people of the same sex), Patti was 'transformed' into a heterosexual who was pretending to be a lesbian, depriving her of the chance to provide a plausible explanation, thus adding layers of stress and violence to an already precarious situation. Yet, plausible explanations can be easily found when SOGI claimants' family relationships are adequately contextualized in the social and legal realities of SOGI minorities in their countries of origin. For instance, according to Diarra (Italy):

When they know you're gay, they kill you with a stick and then you die. (...) I have this son and I had a girlfriend to cover the truth, because when people know that I have a girlfriend, they don't know that I'm gay.

66 For instance, Hersh noticed that the relevance of relationships cannot surprise if attention is paid to the definitions of LGB orientations in the 2012 UNHCR SOGI Guidelines based on 'physical, romantic and/or emotional' forms of attraction: Hersh, *supra* n 5 at 539.

67 ILGA-Europe, *Rainbow Europe 2020* (2020), available at: www.ilga-europe.org/rainboweurope/2020 [last accessed 27 May 2021].

In turn, Siri (Italy) explained the lack of contacts with a partner left behind in the country of origin in very simple but still plausible terms, if the socio-economic conditions of claimants are integrated within the overall assessment: 'I do not know what he is doing now, or where he is because he has no phone. In our country there is nothing'.

Lack of training may contribute to perpetuating these violent effects on SOGI claimants. With no consideration for the evident difficulties to prove same-sex relationships in countries where claimants are persecuted on SOGI grounds, often evidence is still required. Jayne's experience in the UK is illustrative of the contradictions that emerge in decision-makers' approach:

I put in pictures, they wanted, when I went for the interview they said they wanted pictures of me and my ex-girlfriend and I presented, they didn't want in their words anything explicit. So I took some holiday pictures and put it in there, and the judge said, they are just two women on a beach.

In other words, while decision-makers required evidence of an intimate bond but not of a sexual nature, they nonetheless refused to discern a 'meaningful' relationship from a picture featuring the couple together. Although decision-makers' definition of conjugality is framed in heteronormative terms, the genuineness of same-sex couples' experiences is violently denied even when supporting evidence is submitted. This reflects a homonormative and biased assumption that SOGI minorities are not able to build stable, monogamous and affective relationships. While the lack of a reasonable explanation for such disbelief is the cause of much distress, the situation may become violently unbearable when decision-makers assume that every claim is 'fake' as a default position. In such a case, even the strongest evidence that SOGI claimants can submit is immaterial. For instance, in the UK we faced the case of two claimants of the same sex from Sri Lanka whose sexual orientation was questioned even after they married each other (Gary and Debbie, lawyers).

In light of these data, it is promising to come across asylum decision-makers who question such hetero- and homonormative approaches by stressing the 'plausibility' of the relationship(s) rather than undermining the credibility of the claimants. For instance, in a case involving a claimant from The Gambia in Italy, the administrative decision-maker ('*commissione territoriale*') did not believe that the claimant had 'discovered' his sexual orientation only when he was 15 and had had his first sexual encounters in his own place, as that would have carried the risk of being discovered by his parents. Yet, as the appeal judge explained,⁶⁸ given the claimant's lack of financial resources among other reasons, it was very plausible that one would nurture intimate relationships within one's own home in a country where SOGI minorities are seriously punished.

In this context, procedural arrangements that may alleviate the violence the system perpetrates on SOGI claimants, such as sharing the burden of proof in collecting evidence as suggested in UNHCR guidelines,⁶⁹ are not regularly adopted. An example was provided by Giulia (LGBTIQ+ group volunteer, Italy), who reported the case of

68 Tribunal of Venice, judgment No 4971, 14 June 2019 (unpublished).

69 Danisi et al., *supra* n 17 at ch 7.

the asylum applications filed simultaneously by the two members of a same-sex couple. Despite the suspicions raised by the decision-maker in relation to one of the claimants, he chose not to crosscheck with the partner's application to clarify the doubts that had emerged and simply refused the claim, thus unnecessarily inflicting on the claimant the violence of disbelief and denial of protection. Indeed, as a judge pointed out, 'if [two guys] have fled the same persecution, this is an element that may ensure greater truthfulness to their story' (Silvana, Italy). These pitfalls also emerge in European countries that were not covered by SOGICA, such as Malta, with the violent result that claimants belonging to couples may end up in a 'legal limbo', following different procedures and obtaining different outcomes.⁷⁰

In relation to expectations on SOGI claimants' lives in the host countries,⁷¹ too often these include intimate relationships with local lesbian, gay, bisexual, transsexual, intersexual and queer (LGBTIQ+) people. Our data confirm such heteronormative assumptions, considering that the lack of intimate or sexual bonds in an 'open' and 'free' European society was treated with disbelief (Maurizio, judge, Italy; survey participant C54, UK). Claimants producing evidence of such relationships, including intimate conversations over dating apps or romantic social media exchanges, were more likely to be successful (Susanna, social worker, Italy; Livio, lawyer, Italy), although even these bonds are often assessed through heteronormative angles by focusing on the longevity of the relationship, trust or physical and emotional connections to establish their 'meaningfulness' for asylum purposes (Allan, lawyer, UK).

To sum up, with intimate relationships being a central element in the assessment of SOGI claims across Europe, notions of love and intimacy are still heteronormatively and homonormatively construed.⁷² As such, decision-makers do not consistently adhere to UNHCR guidelines, which emphasize the need to adopt a non-judgmental approach⁷³ and require coherence and plausibility to be the main criteria for a fair credibility assessment (Section 6). Yet, in the specific context of relationships, even plausibility risks being an insurmountable obstacle if decision-makers are resistant to sexual, gender and cultural diversity. Such a narrow implementation of refugee law, coupled with other problematic aspects like accommodation and procedures, is indeed instrumental in perpetuating asylum systems that deny individual experiences and produce systematic, but yet invisible and unaddressed, violent effects on SOGI claimants. The investigation of the role that the—direct or indirect—involvement of children in SOGI claims plays in this context sheds further light on these effects.

4. WHEN THE 'PRECIOUS ONES' BECOME DISCREDITING

Children tend to be secondary actors in the asylum system, whose range of voices and identities scholars and activists have made a conscious effort to strengthen.⁷⁴ This

70 ILGA-Europe, 'Annual Review 2020' (2020) at 74, available at: www.ilga-europe.org/annualreview/2020 [last accessed 5 May 2021].

71 Among others, Akin, 'Discursive Construction of Genuine LGBT Refugees' (2018) 23 *Lambda Nordica* 21 at 37.

72 Similarly to other regional and national experiences: Hersh, *supra* n 5 at 527 ff.

73 UNHCR, *supra* n 16 at para 62.

74 Crawley, 'Asexual, Apolitical Beings': The Interpretation of Children's Identities and Experiences in the UK Asylum System' in Tyrrell et al. (eds), *Transnational Migration and Childhood* (2013).

includes their political and sexual identities and behaviours, and affects SOGI minority children as well.⁷⁵ Children play a very important role in adults' SOGI claims and many of our participants had children. Some of our SOGI claimant participants left their children in the countries of origin and suffered the violence of this separation (Jolly, focus group No 3, Bavaria, Germany; Dev, Italy; Edith, Meggs, Miria and Stephina, UK), others took their children with them when they escaped (Angel, Germany; Veronica and Julia, Germany), yet others left them behind for a while but were then able to be joined by them (Jayne, UK). In their countries of origin, children were sometimes victims of discrimination and harassment or social services threatened to remove them on account of their parents' SOGI, which contributed to the decision to escape (Angel, Germany; Veronica and Julia, Germany).⁷⁶ Discrimination and harassment often persisted in Europe, even if often on account of the child's ethnicity rather than their parents' SOGI:

Oh god. She has been called a 'Black b****'. She have been called a n*****. She have been called a monkey. She have been standing at the bus stop and a football was kicked on her purposely. And I was told [by school authorities], there's nothing they can do. (Angel, Germany).

When the asylum legal procedure starts, children unwillingly take a central role. There have been numerous studies pointing out the pernicious ways in which having children is used as a discrediting element in their SOGI minority parents' claims, and examples of this can even be found in the jurisprudence of the ECtHR.⁷⁷ In the sample of sexual orientation claims considered by the UK Independent Chief Inspector of Borders and Immigration in his 2014 investigation, there was a child involved in only 3 per cent of the claims, and in none of those instances the existence of a child was used to refuse the claim.⁷⁸ Our fieldwork told us a different, much more violent story. Reflecting a deeply homonormative view of SOGI claims, whereby the 'genuine' SOGI claimant should be childless, several participants talked about children being used to discredit claimants (Giulia, LGBTIQ+ group volunteer, Italy; Chloe, NGO worker, UK; survey

75 Hedlund and Wimark, *supra* n 6. In our fieldwork, we were told of children obtaining refugee status, both on the basis of sexual orientation (Giuseppe, lawyer, Italy; Cristina, UNHCR officer, Italy; Eleanor, NGO worker, UK) and gender identity (Valentina, social worker, Italy). We also interviewed six participants who arrived in Europe while still children (Bakary, focus group No 2, northern Italy; Buba, Italy; Franco, Italy; Osa, focus group No 4, northern Italy; Jamel, focus group No 5, southern Italy; Junio, UK), and carried out two appeal observations involving appellants who were children at the time they first arrived in the UK (First Tier Tribunal, London, 2018). Our data thus spoke considerably more of children not as SOGI claimants themselves, but rather as children of SOGI claimants, as will become apparent throughout this section.

76 Children of SOGI minority parents living in refugee camps are affected by similar experiences of exposure to danger on account of their parents' SOGI: Obulutsa, 'Lesbians, Gays Live in Fear of Attacks in Kenyan Refugee Camp', *Reuters*, 28 April 2020.

77 *M.K.N. v Sweden* Application No 72413/10, Merits, 27 June 2013.

78 Independent Chief Inspector of Borders and Immigration—ICIBI, 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation March–June 2014' (Gov.UK, 2014) at 32, available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547330/Investigation-into-the-Handling-of-Asylum-Claims_Oct_2014.pdf [last accessed 27 May 2021].

participant S4, lawyer, UK), often with authorities not giving claimants the opportunity to elaborate on their experiences or answer any possible doubts of the decision-maker (Noah, NGO social worker, Germany).

Such actions can happen right at the screening/initial interview, as Angel experienced when she arrived to Germany by airplane and was asked by the policeman in the airport how she could be a lesbian if she had a child. During the main interview, participants also experienced the disturbing power of the stereotype that SOGI minorities do not/cannot have children:

In my interview they asked me how can I be gay and have a son. And I explained to them, like, I just did. My son doesn't have anything to do with my sexuality, my son is because I wanted a child. So, not because I'm gay doesn't mean I have no rights to a child. (Junior, focus group No 1, Hesse, Germany).

The extremely strong connection that exists between most parents and their children and the pain felt at the mere thought of losing them seem to escape some decision-makers, as the experience of Veronica and Julia (Germany) reveals:

With Julia it was the case in the interview that the decision-maker asked what will happen when she goes back home. Julia said: 'We lose the children because the social workers come, it can take a while until they come but they come.' (. . .) And this decision-maker says: 'Is that the worst thing that can happen to you?' Maybe she has no children or I don't know, but the question was really like 'Is that the worst?'

After the traumatic interview they underwent, Veronica and Julia were refused international protection, highlighting the violence of the asylum system towards SOGI claimant parents and their children. At the appeal level, some participants also reported that judges still found it 'surprising' that SOGI claimants would have children, betraying their obvious homonormative mind-set (for instance, Emroy and Junior, focus group No 1, Hesse, Germany). In fact, during a hearing observed in Germany (Hesse, 2018), a judge created an overtly violent environment, refused to listen to the claimant or witnesses, did not ask any questions to the claimant, purposefully left out of the voice-recorded summary elements related to the claimant's sexuality, and even stated openly: 'This story is so deceived, it's unbelievable! [The claimant] has five children and tells me that he is gay all the way! That is unbelievable!'⁷⁹ Yet, positive examples of judges who refuse to promote such homonormative and violent environments were also noticed. For instance, during an observation at the First Tier Tribunal in London in 2018, and in reply to the Home Office presenting officer saying 'it was also highlighted that she was an unreliable witness. She clearly had relations with men and she had had a son', the judge told the appellant: 'the fact that you've had a son doesn't mean you're not a lesbian.'

79 See also discussion in Dustin and Held, *supra* n at 11.

Having children also seems to impose an additional layer of burden of proof on SOGI claimants in Germany (Janina, lawyer; Sofia and Emma, NGO workers). The homonormative character of many decisions seems particularly stark in relation to gay and bisexual men. Nina, a legal advisor, asserted that for asylum authorities it is hard to understand ‘how it can work that a gay man fathers a child with a woman.’ Janina, also a lawyer, expressed concerns particularly in relation to how asylum authorities deal with bisexuality, ‘especially with Arab men, who were, so to speak, forcibly married, maybe even have children.’ For example, there was an instance of withdrawal of international protection (‘Asylwiderrufsverfahren’) when the German asylum authority (‘Bundesamt für Migration und Flüchtlinge—BAMF’) became aware that a male SOGI claimant had become a father, without any enquiry into the details of the situation. Another case regarded a claimant who was in what was effectively a forced marriage where three children had been born; not to lose his children, the male claimant never ‘came out’ to the wife, which raised many doubts in the minds of the decision-makers (Janina, lawyer, Germany).

What this line of reasoning in asylum decisions fails to grasp is that having children is simultaneously the result and cause of very complex sets of circumstances. Children of SOGI claimants were often the result of forced marriages (Edith, UK; Meggs, UK; Miria, UK) and sometimes even rape (anonymous participant, UK). It was also pointed out to us that having children sometimes works as a ‘protective tool’, as it helps the parents—especially mothers—be perceived as heterosexual in their home countries (Noah, NGO social worker, Germany). Subsequently, lesbian claimants may feel under pressure to act more ‘butch’ to be more convincing to decision-makers, but they may also not wish to ‘out’ themselves publicly for fears over their children’s safety.⁸⁰ To the violence of undergoing a forced marriage or rape, the asylum system adds the violence of expecting particular performances of one’s SOGI, disbelieving claimants’ SOGI and denying them international protection. Julian (focus group No 5, Bavaria, Germany) also pointed out that many lesbian refugees wish to have children, without that entailing any hint of bisexuality, as they would rather adopt or resort to in vitro fertilization:

No. Having children doesn’t automatically identify you as bisexual. You can also be a lesbian. I know friends who can have children . . . most people don’t understand this, they think that when you have a child you’ve stopped being a lesbian. And that’s another challenge, and this Bundesamt [German asylum authority] is making people feel guilty because they are having children, that they are not lesbians. Honestly, that is a very big challenge.

We were also told about the violent expectation that claimants’ children be involved during procedures, such as in the case of Harriet (focus group No 2, Bavaria, Germany), whose children (aged 12 and 15 at the time) were also heard. Also in Germany, Veronica and Julia spent 11 hours in the BAMF venue, with two young children, who progressively became hungry and restless, adding to the stress of undergoing an

80 Bennett and Thomas, ‘Seeking Asylum in the UK: Lesbian Perspectives’ (2013) 42 *Forced Migration Review* 25 at 28.

asylum interview. When claimants' children were not taken to appeal hearings to act as witnesses, that was used against the claimants, although the intention was to protect children from discussions surrounding sexuality, trauma and rape (Jayne, UK).

Beyond their role in the legal claim, children also played a crucial role in the overall experience and journey of many SOGI claimants and refugees we met. It is known that displacement causes much distress to refugee parents and families, on account of family separation, loss of social support and a sense of reduced parental efficacy; yet this is often accompanied by increased caregiving, perseverance and additional efforts to remain close where possible.⁸¹ Several women told us about the violence they suffered when they had to leave their children to escape or were separated from them against their will (Meggs, UK; Stephina, UK). As Stephina told us, '[i]t was the most difficult thing for me to leave my daughter because I love her to death like, every fibre in me appreciates that I have got a child as brilliant as she is'. While having their children with them during the asylum process may offer some emotional comfort against the violence of the asylum system, it also entailed a range of complex issues related to children's extremely limited income, lack of employment opportunities and overall growing resentment against their parents for the situation they find themselves in and the violence they undergo within the asylum system (Jayne, UK). If international protection is granted, SOGI claimants whose children remained in their countries of origin often urgently want to reunite with their children through family reunification.

By distorting and manipulating their intimate and parenting relationships, the current European and national legal frameworks act as normalisers of the violence suffered by SOGI claimants, as we will now discuss.

5. EUROPEAN AND DOMESTIC LEGAL FRAMEWORKS AS NORMALIZERS OF LEGAL VIOLENCE

Considering the overall individualistic approach to the notion of refugee, considerations based on family or intimate relationships are very limited within the Refugee Convention system. Yet, owing to the severe consequences of seeking asylum on family relationships and family unity as a fundamental human right,⁸² the authors of the Convention recommended States parties 'to take the necessary measures for the protection of the refugee's family.'⁸³ Given the time of its adoption, it may not be surprising that, in doing so, particular attention was devoted to refugees who are minors as well as to those (presumably men in heterosexual relationships) who are the 'head of the family.'⁸⁴

81 Akesson and Sousa, 'Parental Suffering and Resilience among Recently Displaced Syrian Refugees in Lebanon' (2020) 29 *Journal of Child and Family Studies* 1264.

82 Article 16 of the Universal Declaration on Human Rights 1948, GA Res 217A (III), A/810 at 71 (1948). The influence of the Universal Declaration is evident in this context given that the authors of the Convention defined family by using the Universal Declaration's terms ('the natural and fundamental group unit of society'). See Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951. On the limits and problematic aspects of such definition, including its still debatable heteronormative understanding, see Danisi, 'La Tutela della Vita Privata e Familiare nella Dichiarazione Universale dei Diritti Umani: Standard Superati o ancora Potenziali?' in Tonolo and Pascale (eds), *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo* (2020).

83 Ibid. Recommendation B of the Final Act.

84 Ibid.

Overall, the concept of family enshrined in the Refugee Convention system is not gender or SOGI-sensitive, thus reflecting a heteronormative view of family and kinship.

On the one hand, being focused on the interpretation of the refugee definition, the UNHCR guidelines do not emphasize that SOGI claimants may also need protection for ‘their’ families. Family is brought to the forefront largely in negative terms when family members are agents of persecution.⁸⁵ Moreover, whereas considerations of family and intimate relationships are mostly limited to the context of credibility assessment,⁸⁶ restrictions to the enjoyment of family rights are not given sufficient weight in the identification of what amounts to persecution, unless cumulatively considered with other human rights violations.⁸⁷ This betrays a somewhat homonormative interpretation of the notion of refugee and contributes to adding specific layers of violence against SOGI claimants in terms of overall invisibility of non-traditional families and intimate relationships. On the other hand, at least indirectly, the jurisprudence of the ECtHR shows how national authorities undervalue SOGI refugees’ family life. A recent case signals the risk faced by LGBTIQ+ people living with their partners in Europe of being deported to their country of origin, in violation of Article 3 ECHR, when their intimate relationships and family lives fail to be protected under non-asylum legal frameworks, such as family reunification.⁸⁸

In this section, we thus shift from ‘protection from’ the family to ‘protection for’ the family to show how such systematic invisibility in European and national legal frameworks and the violent effects it causes seriously affects SOGI claimants’ lives, both in the short and long term. To this end, we analyse three different contexts where claimants’ and refugees’ right to family life should be protected but, owing to their SOGI, it seriously risks being denied. Being SOGICA country case studies all EU Member States at the time of our research, these contexts include the implementation of two EU-level legal tools, namely the Dublin Regulation⁸⁹ and the Family Reunification Directive,⁹⁰ and the legal obstacles that SOGI refugees have to face to enjoy their right to have their union legally recognized across Europe. As it will become evident throughout this analysis, the result of these contexts is to prevent people like Buba (Italy), whose boyfriend helped him escape but remained in their country of origin, from reuniting

85 UNHCR, *supra* n 16 at paras 35 and 64.

86 *Ibid.* 63, vi–vii.

87 *Ibid.* 23–24.

88 *B and C v Switzerland* Applications Nos 43987/16 and 889/19, Merits, 17 December 2020.

89 Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31. More generally, on the Common European Asylum System (CEAS) of which Dublin is an integral part and SOGI, see Ferreira, ‘Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?’ (2018) 5 *GenUS* 25.

90 Council Directive 2003/86/EC on the Right to Family Reunification [2003] OJ L 251. This Directive should be read in combination with the right expressed in Article 23 of the Qualification Directive on the obligation of EU Member States to ensure the family unity of refugees (but only if family was established before fleeing persecution). See Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

with his beloved one and have their family life protected in Europe, and to force partners to undertake desperate journeys to reach Europe.

The Dublin Regulation (III) clearly states that respect for family life should be a primary consideration in its implementation. Therefore, at least in theory, when SOGI claimants submit an asylum application in an EU Member State, they may be transferred to another EU Member State if they wish to be reunited with a family member who has already been granted international protection there (Article 9) or whose asylum application is still pending (Article 10). Under the Regulation, the Member State hosting the family member becomes the State responsible for assessing their asylum claim. Yet, in all its different versions, the content and the implementation of the Dublin Regulation has attracted considerable criticism for its ineffectiveness in achieving a real ‘burden sharing’ in the assessment of asylum claims submitted in, or at the borders of, the EU, while ensuring full respect for claimants’ human rights.⁹¹ It has also become clear that the criteria identified in the Regulation to allocate responsibility for examining asylum applications between EU Member States specifically increase the precarious condition of SOGI claimants.⁹² This is the case when family and intimate relationships are considered either in substantive or procedural terms, thus contributing to the violence caused by the asylum system to SOGI claimants.⁹³

In fact, when the individuals to be reunited are unmarried/de facto same-sex partners, the possibility of being reunited with ‘the’ family member becomes illusory, owing above all to its heteronormative framing. First, the Regulation leaves considerable discretion to Member States in the identification of what ‘family members’ means. According to Article 2(g) of the Regulation, unmarried partners in a stable relationship only constitute ‘family members’ where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals. As a result, a Member State may choose not to recognize as a family member the unmarried same-sex partner of a SOGI claimant, thus preventing them from being reunited under the Dublin Regulation. Moreover, in the case of family members whose application is still pending, the Dublin Regulation (Article 10) requires the family relationship to have already existed in the country of origin for the couple to enjoy the right to be reunited. SOGI claimants’ intimate relationships built after fleeing persecution are thus legally erased, being effectively excluded from the scope of this provision. This disregards the fact that most SOGI claimants are only able to enter an open relationship after fleeing persecution, that is, outside their country of origin. The deprivation of their right to respect for family life thus adds layers of violence to SOGI claimants’ lives.

Second, although it is true that the Regulation acknowledges that in some circumstances there may not be any formal proof and Member States may accept circumstantial evidence that is coherent, verifiable and sufficiently detailed (Article 22(5)), the

91 Among many others, Munari, ‘The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime’ (2016) *Diritti umani e diritto internazionale* 517.

92 Wieland and Alessi, ‘Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register with the European Court of Human Rights?’ (2021) 30(3) *Social & Legal Studies* 405; Danisi, ‘What “Safe Harbours” Are There for Sexual Orientation and Gender Identity Asylum Claims? A Human Rights Reading of International Law of the Sea and Refugee Law’ (2018) 5 *GenIUS* 9 at 19 ff.

93 See Recitals 14–18 and Articles 9 and 10.

national implementation of this norm still gives rise to contradictory practice.⁹⁴ For example, when a Member State is willing to qualify SOGI claimants' partners as 'family members', the evidence produced by asylum claimants risks nonetheless being assessed through a heteronormative lens, as shown above (Section 3). As SOGI claimants' relationships usually lack legal recognition in their country of origin or transit (and such lack of recognition being an element of persecution itself), the Regulation puts on these claimants an additional evidentiary burden that compounds the violence produced by the asylum system.

Third, there is no guarantee that, in implementing the right to information about the Dublin procedure (Article 4) or during the personal interview (Article 5), Member States provide appropriate information from a SOGI perspective on the possibility to be reunited with their partners and other family members.⁹⁵ Similarly, when children are involved, the Regulation does not always provide appropriate weight to their best interests,⁹⁶ which may require considerations based on SOGI as well. Finally, given all problematic aspects emerged here, both Member States and their national authorities hardly value queer conceptions of family in implementing the Dublin Regulation.⁹⁷ As a result, all kinship relations that are valuable for SOGI claimants but do not conform to the nuclear (heterosexual) family model are forcibly left out of the scope of the Regulation, disclosing the overall homonormative construction of the Common European Asylum System (CEAS).

In sum, the Dublin Regulation fails to pass a 'SOGI-sensitivity test' as far as the right to respect for family life is concerned. The heteronormative underpinnings of the Dublin Regulation and its implementation pitfalls explored so far were confirmed by our interviewees. For instance, Janina (lawyer, Germany) explained that, under the Dublin Regulation, SOGI claimants in intimate relationships with other SOGI claimants seriously risk being separated and sent to different EU Member States for not being legally recognized as partners. As she nonetheless confirmed, it may happen that, in implementing their discretionary powers, national authorities accept 'informal' evidence of SOGI claimants' relationships to keep couples united. The uncertainty and discretion in this respect are bound to produce violent effects on SOGI claimants' experiences in the asylum system.

Although a reform of the Dublin Regulation is therefore urgent to stop the invisibility of SOGI claimants' families, similar concerns can be raised in relation to the heteronormative underpinnings and implementation of the EU legal tool regulating the right to family reunification.⁹⁸ The Family Reunification Directive aims to foster the stability of immigrants in the host community (see, for instance, Recital 4) by granting a person legally residing in an EU Member State the right to be reunited with a family

94 UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017.

95 Similarly to the pitfalls in the implementation of the right to information on asylum and, more specifically, on SOGI asylum upon claimants' arrival; see Danisi et al., *supra* n 17 at ch 6.

96 For example, the conclusions of the CJEU in *C-648/11 M.A. and Others* [2013] ECLI:EU:C:2013:367.

97 Ritholtz and Buxton, *supra* n 7 at sect 4.

98 The situation is problematic also in European countries that are not members of the EU. For instance, ILGA-Europe reported that the current family reunification requirements in Norway (namely, partners must be married, or living together for at least two years, or have children together) are 'either impossible or too dangerous for most LGBTI refugees to fulfil': ILGA-Europe, *supra* n 70 at 84.

member living in a third country. In theory, the discretion left to Member States in decisions allowing family reunification is very limited.⁹⁹ As the Court of Justice of the EU (CJEU) has confirmed,¹⁰⁰ if the Directive's conditions are met, Member States must authorize reunification and, as far as possible, should facilitate its enjoyment. Significantly, in addition to other categories of immigrants, refugees are also entitled to apply for family reunification (Articles 3 and 9 ff) irrespective of the grounds of persecution. To this end, all refugees can benefit from more favourable conditions than other addressees of the Directive (Chapter V), at least in terms of requirements relating to the material standards of life in the EU of the person applying for reunification.

Yet, again, the conditions established by the Directive risk depriving SOGI minorities from effectively enjoying this right. Unless the specific conditions of SOGI claimants are fully taken into consideration and the obligation to implement the Directive without discrimination based on sex or sexual orientation is respected,¹⁰¹ as Article 21 of the EU Charter of Fundamental Rights (CFR) requires,¹⁰² its implementation may lead to a denial of reunification owing to the impossibility of complying with requirements clearly based on heteronormative understandings of family relationships. Similarly to what we saw above in relation to the Dublin Regulation, the result is a 'clear legal insecurity' as well as a 'manifest discrimination' against SOGI minorities.¹⁰³ In fact, the discretion left to Member States in relation to the recognition of unmarried partners as potential beneficiaries of family reunification (Article 4(3)), the possibility to restrict reunification only to relationships already established 'before' the applicant's entry in the EU (Article 9(2)), and the evidence required to prove a stable long-term relationship, are particularly problematic if evaluated through the prism of SOGI claimants' experiences. For instance, evidence like 'previous cohabitation' or 'registration of the partnership', as mentioned in Article 5(2), may simply not be available.¹⁰⁴ Even when attention is focused on the concept of 'dependency',¹⁰⁵ as provided in Article 10(2), it may be impossible to prove such dependency between SOGI refugees and their third-country partners if the couple has always lived their relationship 'in the closet' in their country of origin. It goes

99 Del Guercio, 'Quali Garanzie per il Diritto all'Unità Familiare dei Richiedenti e dei Beneficiari di Protezione Internazionale con Coniuge/Partner dello Stesso Sesso?' (2018) 5 *GenIUS* 59 at 66.

100 Among others, judgments in C-540/03 *European Parliament v Council of the EU* [2006] ECR I-05769 at para 52 ff; C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839 at para 43 ff; C-133/19, C-136/19 and C-137/19 *B.M.M. and Others v État Belge* [2020] ECLI:EU:C:2020:577 at para 25.

101 In line with the CJEU's case law, 'sex' also covers gender reassignment under the non-discrimination provisions: see, among others, C-13/94 *P v S and Cornwall County Council* [1996] I-02143. As a result, gender identity is only partly covered within the scope of the Family Reunification Directive, with the potential exclusion of some trans refugees.

102 Charter of Fundamental Rights of the EU (CFR) [2012] OJ C 326/391.

103 Lafuente, 'Refugio y Asilo por Motivos de Orientación Sexual y/o Identidad de Género en el Ordenamiento Constitucional Español' (Universitat de Valencia, 2014) (our translation).

104 For a concrete example, see the critique of the Austrian implementation of the Directive when these provisions are to be applied to same-sex refugee couples in Sußner, 'Invisible Intersections: Queer Interventions and Same Sex Family Reunification under the Rule of Asylum Law' in Spijkerboer (ed), *Fleeing Homophobia: Sexual orientation, gender identity and asylum* (2013).

105 Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (UNHCR 2018), PPLA/2018/01, at 34 ff.

without saying that, even in this context, queer conceptions of ‘family’ relationships are ‘inexistent’ in the eyes of the law as well as of decision-makers despite their discretion in implementing the Family Reunification Directive. When decision-makers do not use such discretion to accept a wider variety of means of proof and family models that are valuable (or the only legally available) for SOGI refugees, the violent process of erasing love and family is completed.

We can address a final context in which law acts as a normalizer of the violence suffered by SOGI claimants and refugees in Europe. In host countries where same-sex couples may marry or enter into a registered partnership, SOGI claimants or refugees may be asked to submit documents from their country of origin’s civil registry, such as a declaration proving their unmarried or ‘free’ status,¹⁰⁶ something that can be impossible to obtain. Notwithstanding homonormative concerns underlying this particular aspect, SOGICA interviewees confirmed the harm caused by such legal obstacles. Shany, claiming asylum in Germany, pointed out that:

The guy [civil registry officer] said ‘yeah, everything is fine [to obtain marriage documentation]. Yeah, with your embassy, can you bring the birth certificate? I don’t think they will give you [one] . . .’. So, you know, for the people who have asylum, we cannot marry.

As Evelyne and Anne (lawyers, Germany) further explained, the system forces SOGI claimants to contact the diplomatic representation of their country of origin, namely the same officials who might have persecuted them or did not provide protection against persecution, no matter the additional distress and the fear this causes. Besides, there is no guarantee that the diplomatic representation is willing to provide such documents, even when asylum has not been requested yet. In this regard, Anna (LGBTIQ+ group volunteer, Italy) reported the case of a Russian national who found himself in a very stressful situation because he could not decide between two evils: either claiming asylum for persecution based on his sexual orientation, with the risk of being unable to meet his mother again in case he could not visit Russia anymore, or entering into a civil partnership with his Italian fiancé, with the risk of being unable to provide the necessary documentation from Russian authorities and being eventually deported. As Giuseppe (lawyer, Italy) confirmed, if the country of origin’s authorities deny the relevant documents because that country systematically denies SOGI minorities’ rights, Italian officials may refuse to officiate a registered partnership unless a judge, after being requested to do so by the interested person, orders the officials to proceed. This nonetheless requires time, knowledge and financial resources, which asylum claimants may not have. In short, such legal obstacles may seriously reproduce the violent and heteronormative persecutory environment that SOGI claimants have tried to escape.

The overall pressure and distress that these legal frameworks and their implementation inflict on SOGI claimants were clearly articulated in the context of the SOGICA fieldwork. The difficulty in getting married to one another in Germany, where they

106 See, for instance, the case of Italy according to Article 116 of the Civil Code. As Del Guercio asserts, such a difficulty may be overcome if national authorities accept other kinds of evidence proving the ‘free status’ of the claimant/refugee, including documentation provided by the UNHCR: Del Guercio, *supra* n 99 at 71.

eventually claimed asylum, coupled with the pressure to prove their same-sex relationship, forced Veronica and Julia to look for another EU Member State where they could have their union recognized. As they explained:

That day we fly on to Denmark, to Copenhagen, because we want to make a marriage so our [asylum] case, our thing is done together, not separated. . . . There we had marriage in Copenhagen, because it is possible there that two people who do not belong to this State, foreigners can, so to speak, marry there.

To sum up, the protection of SOGI claimants' intimate relationships and family lives still depends on the notion of family adopted in each (EU or national) legal framework, as well as on the protection that the host country affords to non-traditional families and SOGI refugees more generally—both through their laws and practices. By adopting legal violence as the main analytical tool to explore our primary data, combined with an exploration of the heteronormativity and homonormativity of relevant legal frameworks, we were able to bring to light and articulate in a systematic way the violence legitimized or produced by law and practice regulating family matters against SOGI refugees in Europe. Rather than isolated incidents or individual opinions of some actors in the asylum system, the themes discussed so far contribute to a clear overall picture of a violent system. The resulting legal invisibility of SOGI claimants' intimate and family relationships is palpable, and a genuine improvement in this field requires a paradigm shift. This is why, in the next section, we elaborate on a principled approach to SOGI claimants' intimate and family relationships that can guide decision- and policy-makers, either when these relationships become central to the assessment of the asylum claim or when SOGI claimants' families need protection.

6. REDRESSING LEGAL VIOLENCE IN SOGI ASYLUM: A PRINCIPLED APPROACH

The analysis carried out so far highlights the urgency of introducing an alternative approach that may prevent the different forms of legal violence to which SOGI claimants and refugees are exposed in Europe. Here, we elaborate a principled approach that is rights-orientated and based on the complex and non-linear lived experiences of SOGI claimants and refugees. Such an approach, when applied to SOGI claimants' family and intimate relationships, calls into question the values underlying European legal frameworks,¹⁰⁷ in particular the heteronormative, homonormative and Western-based cultural understandings of decision-makers. This state of affairs is not limited to asylum law and policy but also impinges on relevant European legal frameworks protecting family-related rights, because these have not been designed taking into account SOGI claimants and refugees' realities.

For these reasons and despite the limits that will be pointed out below, the starting point of our approach for immediate meaningful law and policy changes relies on

107 These values and the urgency of revision in the practice of States belonging to the Council of Europe are at the heart of the Parliamentary Assembly of the Council of Europe's concerns already expressed in 2000: Recommendation 1470 (2000), The situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe, 30 June 2000.

human rights. These can provide answers to the protection needs of claimants' and refugees' families by informing and complementing the Refugee Convention system. More specifically, we refer to the right to respect for family life as protected by relevant human rights frameworks, a right that claimants and refugees are entitled to enjoy without any discrimination based on SOGI or on any intersection between these or other characteristics.¹⁰⁸ Before investigating how such a guarantee can find concrete application to build fairer asylum systems for SOGI refugees, a preliminary understanding of this right as applied to SOGI minorities is necessary. Maintaining our focus at the European level, Article 8 ECHR has never been explicitly interpreted in relation to SOGI claimants' intimate or family relationships. However, it has been read in a way that protects non-heterosexual relationships,¹⁰⁹ as well as refugees' family unity,¹¹⁰ either in terms of reunification or in relation to deportation. The jurisprudence of the ECtHR indeed moves into two different, but intersected, directions. On the one hand, the concept of family includes *de facto* relationships that are essentially stable.¹¹¹ On the other hand, contracting States may be obliged to authorize family reunification when otherwise an unjustified interference with the enjoyment of the right to family life would occur.¹¹² Similarly the CFR, especially its Article 7 protecting family life alone or in combination with Article 21 on non-discrimination,¹¹³ must inform all EU legislation and policy on both asylum and family-related rights. On these grounds, the CJEU reached interpretations of EU law that can be useful to broaden the scope of the EU legal frameworks explored above to address SOGI claimants' and refugees' specific family needs. For example, it found that a third-country national, who married an EU citizen in a Member State where same-sex marriage is allowed, cannot be denied the right to reside in the territory of the Member State of which their same-sex partner is a national only because such a Member State does not recognize same-sex marriages.¹¹⁴

What could this evolution mean for reducing the legal violence perpetrated against SOGI claimants and refugees? Some have argued that the intersection of these separate, but complementary, guarantees—as refugees and as SOGI minority members—may avoid the formal (but unfair) equal treatment of opposite- and same-sex refugee couples.¹¹⁵ Our principled approach goes even further. It argues that such legal developments in human rights law may inform valuable solutions to the different—but similarly detrimental—instances of legal violence that emerged in the previous sections while combatting the invisibility of SOGI claimants' intimate relationships and families.

Let us address first the issues that have emerged when asylum systems deal with SOGI claimants' intimate and family relationships. A principled approach requires national authorities to design solutions to maintain family unit during the reception

108 Ibid. paras 6-7.

109 *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010 at para 94.

110 *Mugenzi v France* Application No 52701/09, Merits, 10 July 2014 at para 54.

111 *Pajic v Croatia* Application No 68453/13, Merits, 23 February 2016 at paras 61–68.

112 Ibid. para 84.

113 See Article 52 CFR, according to which the CFR should be given the same interpretation of the ECHR in case of similar provisions, which is the case of Article 7 CFR and Article 8 ECHR (although higher standards of protection are not precluded by the CFR: see Article 53 CFR).

114 C-673/16 *Coman and Others* [2018] ECLI:EU:C:2018:385 at paras 48-51, 56.

115 Del Guercio, *supra* n 99 at 64 ff.

phase, either by setting up specific SOGI accommodation units or, if placed in shared accommodation, by allowing SOGI claimants to occupy the same room as their partners and children. Only individualized solutions can simultaneously secure SOGI claimants' rights to family life, privacy, non-discrimination and freedom from any kind of abuse and harassment by other actors in the asylum system, which are all rights protected at European level by both the ECHR (respectively, Articles 8, 14 and 3) and the CFR (respectively, Articles 7, 21 and 4). In other words, the status of LGBTIQ+ people and their partners as asylum claimants does not take them out of the scope of application of such rights, but demands instead appropriate solutions for facilitating the enjoyment of those rights.

In terms of asylum procedure, a rights-based approach can guide decision-makers in at least two different ways. First, in line with the CJEU case law,¹¹⁶ SOGI claimants have the right to a dignified interview, which entails an obligation to refrain from questions about sexual practices with past or current partners or from asking for evidence of sexual nature. In this respect, the UNHCR SOGI Guidelines have also clarified that it would 'be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.'¹¹⁷ Second, while the asylum process is essentially framed around the need for an individual assessment, same-sex couples claiming asylum should be granted the possibility to be heard together if they request so, whereas the presence of children should be decided in light of considerations primarily based on their best interests. As Livio (lawyer, Italy) pointed out, claimants are only rarely heard as a couple, but there is no clear explanation whether this state of affairs is due to decision-makers (who may not allow similar requests) or to claimants (who may not be aware of this possibility). Yet, joint hearings in SOGI asylum claims can be a useful tool for decision-makers to verify inconsistencies in testimonies, while simultaneously balancing the unequal power relations that characterize asylum interviews.¹¹⁸ Although Silvana (judge, Italy) agreed on the positive effects of such procedural arrangements in terms of credibility, she rightly cautioned us to the fact that joint hearings risk being used by some decision-makers as a way to 'prove' claimants' SOGI, as it happens with the testimony of partners in host countries. In her own words, 'for me it is immaterial whether you have or had a heterosexual or same-sex relationship. ... Only the way you are perceived in your country of origin is fundamental.'

This brings us to asylum adjudication and credibility issues surrounding claimants' intimate relationships. It is worth remembering that, according to UNHCR guidance, '[c]redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.'¹¹⁹ As both the CJEU and domestic highest judicial instances have confirmed in relation to SOGI claims,¹²⁰ the focus in refugee status determination procedures should be placed on the reasons why claimants risk being persecuted. So,

116 C-148/13 to C-150/13 A, B and C v *Staatssecretaris van Veiligheid en Justitie* [2014] ECLI:EU:C:2018:877, on which Ferreira, *supra* n 89 at sect. 2.2.

117 UNHCR, *supra* n 16 at para 64.

118 Danisi et al., *supra* n 17 at ch 6.

119 UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, at para 11.

120 C-473/16 F. v *Bevándorlási és Állampolgársági Hivatal* [2018] ECLI:EU:C:2018:36; Italian Supreme Court, judgment No 2875/2018, 6 February 2018.

rather than investigating claimants' 'actual' SOGI, decision-makers should investigate if claimants have reasons to fear persecution 'on account of their—real or perceived—SOGI. Yet, current asylum systems still connect a positive credibility assessment with proving claimants' identity through Western-based, homonormative ideas of same-sex relationships, whereas the focus should be placed on the plausibility of SOGI claimants' overall accounts. Past or current intimate and family relationships (or lack thereof) should only be relevant for the purposes of assessing that risk of persecution. That is why UNHCR SOGI Guidelines emphasize that investigating 'romantic and sexual relationships (. . .) is not [in itself] an effective method of ascertaining the well-foundedness of the applicant's fear of persecution on account of his or her [SOGI]'.¹²¹

The variety of experiences in intimate and family relationships should therefore confirm the plausibility of different testimonies rather than undermine claimants' credibility. For example, the absence of intimate or sexual relationships in the country of origin can be an indication that claimants accepted being denied the right to enjoy their right to family life in order to avoid harm, rather than signalling a fake claim. Conversely, considering that SOGI is often defined in terms of identity,¹²² claimants may be easily persecuted irrespective of their relationships if a certain (non-heterosexual or non-cisgender) SOGI is essentially imputed to them. If one bears in mind situations of post-traumatic stress disorder and internalized homophobia, besides the obvious difficulty to discuss such private matters with a stranger, it is equally plausible that a claimant may be reluctant to discuss aspects of their past or current relationships in an asylum interview.¹²³ Similarly, as past literature has already shown and SOGICA participants confirmed, decision-makers may find reasonable explanations for the lack of relationships in the host country if attention is paid to the lived experiences of SOGI claimants, which include experiences of trauma,¹²⁴ feelings of fear or shame,¹²⁵ mistrust or dissociation,¹²⁶ discrimination on ethnic grounds and socio-cultural differences, as well as lack of economic resources to be involved with the local LGBTIQ+ community. Most importantly, from a human rights perspective, the right to respect for private and family life under the ECHR and the CFR could also be read as the right not to have intimate or family bonds. As with everyone else, SOGI claimants cannot be told how this right should be enjoyed, including for the purpose of obtaining international protection. All in all, if the right to respect for family life is duly interpreted and applied within asylum systems, there is scope for improvement in preventing the violent effects that law and policies produce on SOGI claimants and refugees.

When intimate or family relationships are reported by the claimant, it is essential to question heteronormative, homonormative and culturally biased assumptions to understand apparent inconsistencies before rejecting the claim on grounds of lack of credibility. For instance, it is entirely plausible that past or current marriages or having children have been ways to escape persecution, especially when family members are

121 UNHCR, *supra* n 16 at 63, vii.

122 See the (problematic) statement made on this point even by UNHCR in its SOGI Guidelines: *ibid*.

123 Hersh, *supra* n 5 at 543 ff.

124 Alessi et al., *supra* n 61 at 805.

125 Berg and Millbank, *supra* n 52 at 201.

126 Hersh, *supra* n 5 at 546.

the agents of that persecution.¹²⁷ These explanations may be hardly acceptable to decision-makers who conceptualize SOGI claimants' intimate relationships within a heteronormative paradigm. Some sort of cohabitation, long-term and/or monogamous commitments, shared everyday life activities or expectations of romantic feelings or continuous contacts, are still used to assess the 'meaningfulness' of an intimate relationship, although the socio-cultural background and legal realities of SOGI minorities clearly make it plausible for such elements to be absent in some claimants' experiences. A good example of what a principled approach instead requires was reported in Italy. Being aware of the influence of biased assumptions in SOGI asylum claims, a decision-maker granted refugee status to a married man who had no intention of divorcing his wife because, as a religious leader, he wanted to save his reputation within the community by not revealing his sexual orientation (Roberto, Italy), thus sparing the claimant the violence of a 'forced divorce' in order to obtain international protection. For asylum adjudication to take place in fair and culturally appropriate terms, the acceptance that the right to family life can be enjoyed in very different ways and should be protected in different contexts becomes therefore paramount.

When children are involved, a rights-based approach should combine respect for the right to family unity with considerations based on the principle of the best interests of the child, which finds its primary legal basis in Article 3 of the Convention on the Rights of the Child.¹²⁸ While the need for child-friendly procedures was already pointed out, such a right can play a fundamental role also in the adjudication of asylum requests submitted by SOGI claimants fleeing persecution with their children. The Committee on the Rights of the Child's approach in its first-ever decision involving SOGI asylum is a case in point.¹²⁹ In evaluating under the Convention the possibility of returning a family to a country where legislation discriminates against sexual and gender minorities, the Committee on the Rights of the Child contested the national authorities' argument according to which the threshold of persecution was not met because the family only experienced discrimination in their country of origin. It thus found that the national authorities had failed to carry out a proper asylum assessment, because the impact of violence and harassment in a homophobic society in the country of origin had not been considered in their evaluation of the risk of refoulement. Consequently, only an assessment that takes due account of children's best interests to live safely and receive appropriate care in a way that would effectively ensure their holistic development can avoid the risk of producing an irreparable harm, in other words violence, to SOGI claimants' children. This approach is certainly required in the event of return but can have wider implications if duly applied to all aspects of SOGI families' asylum journey.

In short, when the lived experiences of SOGI claimants and their family rights are taken seriously, the violent effects generated by asylum and migration rules and their implementation (Sections 3, 4 and 5) can be considerably reduced. The principled approach delineated here can help combat the invisibility of SOGI claimants'

127 For instance, Jansen, 'Pride or Shame? Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments' (COC Netherlands, 2019) at 99.

128 This principle is also affirmed in Article 24 CFR and is regularly considered in the interpretation of the ECHR. For a discussion on how this principle finds application in migration, see Crock and Benson (eds), *Protecting the Migrant Child* (2018).

129 *A.B. v. Finland* (51/2018), Views, CRC/C/86/D/51/2018.

and refugees' intimate relationships and families in European legal frameworks. This requires a re-definition of the concept of family in asylum and migration in compliance with evolving human rights standards. In these contexts, many European States still adopt a narrow definition that is based on the Western, heteronormative and nuclear idea of family.¹³⁰ Expanding the concept of family for asylum purposes is required by the obligation to ensure that SOGI claimants and refugees do not suffer discrimination of any kind in their enjoyment of rights protecting their intimate and family relationships, as European Courts have made it clear. This also includes indirect discrimination, which may occur when legal frameworks set marriage or another form of legal recognition as a condition for enjoying a right or benefit and treat all unmarried couples equally, thus ignoring the situation of same-sex couples who may not be able to marry (in their country of origin or in their host country).¹³¹

Consequently, if human rights are to inform the next EU reforms of CEAS¹³² and related migration legislation, the recast of the Dublin Regulation and the Family Reunification Directive must include some important changes. A reform should treat unmarried partners as family members by default, with no discretion for Member States as far as family reunification is concerned. As the CJEU's reasoning in *Coman* suggests,¹³³ such lack of discretion would not impinge on the competences of Member States in family law because national authorities would remain free to decide whether or not to allow marriage and/or other forms of legal recognition for same-sex couples. If specific SOGI considerations apply, new legislation in these fields should clearly identify SOGI claimants and refugees' family members as beneficiaries of all measures protecting the right to family life, with no requirements in terms of recognition of their relationship and related evidence.¹³⁴ Thus, a preliminary condition for all measures advanced here is the adoption of a univocal gender-neutral definition of family—one that explicitly includes same-sex partners irrespective of their marital status—in Article 2 of the proposed Qualification Regulation, it being the common reference for all CEAS instruments. To improve conditions upon arrival, the future CEAS reform could include SOGI claimants in the group of people with particular needs in Article 2 of the proposed Reception Conditions Directive recast. This addition would require national authorities to pay greater attention to the specific conditions of SOGI minorities and greater chances to identify and address specific family needs during the individual assessment of each claimant. If the Dublin Regulation applies as well upon arrival, a

130 Nicholson, *supra* n 105 at 35.

131 For an analogous situation, see *Taddeucci and McCall v. Italy* Application No 51362/09, Merits, 30 June 2016 at paras 95–98. This is especially the case for SOGI because, according to the ECtHR, where a difference in treatment is based on sexual orientation or gender identity the State's margin of appreciation is narrow and, even if very serious reasons can be advanced to justify such a treatment, differences based solely on SOGI considerations are unacceptable under the Convention. The same is true for differences based on ethnic origin that may include refugees: *Biao v. Denmark* Application No 38590/10, Merits, 24 May 2016 at para 138.

132 Ferreira, *supra* n 89.

133 *Coman and Others*, *supra* n 114 at para 37.

134 In this respect, as for reunification, the 2014 Commission's guidance would certainly be a good starting point in light of the restrictive interpretation of the derogations that Member States may adopt in relation to refugees' reunification. See EU Commission, Communication from the Commission to the European Parliament and the Council on Guidance for Application of Directive 2003/86/EC on the Right to Family Reunification (COM/2014/0210 final), 3 April 2014, at 20.

principled solution would at least allow SOGI claimants to be reunited and accommodated with their unmarried same-sex partner already in the EU, even when their relationship developed outside their country of origin. The criteria for determining the Member State responsible for the evaluation of the asylum request as established in Chapter III of the Dublin (III) Regulation, the dependency clause (Article 16) and the related evidentiary standards should all be revised accordingly in future reforms, be it a recast of that Regulation or a new Regulation replacing the Dublin system.¹³⁵

For the specific purpose of reunification, in addition to expanding the notion of ‘family members’ by limiting Member States’ discretion in this regard, the recast of the Family Reunification Directive should also cover those relationships built after fleeing persecution as well as actual dependants in light of the cultural context of SOGI claimants and refugees, which may allow, for instance, the children of one’s partner to be reunited despite the lack of formal recognition (for instance, by amending accordingly Articles 4, 5, 9, 10 and 11).¹³⁶ A similarly culturally sensitive approach should also apply not to make the enjoyment of the right to family life dependent on specific documentation from the country of origin, such as in the case of marriage or civil partnership. Such an approach already finds support in the European Commission’s guidance in this field when it affirms that national authorities need to ‘take into account the particular situation of refugees who have been forced to flee their country and prevented from leading a normal family life there’,¹³⁷ something that requires ‘a balanced and reasonable assessment in every individual case of all the interests at play’.¹³⁸

We are conscious that the principled approach elaborated so far has some limits, as it does not go as far as contesting central elements of the heteronormative structure of society, such as stable partnerships and the nuclear family, as queer theories would suggest.¹³⁹ Queer ‘chosen’ ties, here meant as the variety of kinship that sexual and gender minorities develop in their lives such as non-monogamy, non-couple centered or extended relationships, risk being deprived of protection if the proposed reforms do not also lead to the deconstruction of cisheteronormative assumptions behind the notion of family itself. The implications of a more ambitious approach were evident across the SOGICA country case studies. Even defining a partner simply as a ‘friend’ rather than ‘boyfriend’ raised suspicion in some decision-makers, signalling a lack of understanding of the personal or cultural reasons for using such a term and, more broadly, of queer ‘chosen’ ties (Tribunal observation, northern Italy, 2018). Yet, while we do not reject a more radical reform to be pursued in the long term, we have opted for

135 On 23 September 2020, in the context of the ‘New Pact on Migration and Asylum’, the Commission proposed to replace the Dublin (III) Regulation with a new Regulation on Asylum and Migration Management (COM(2020) 610 final). However, as the Commission stated, the ‘current criteria for determining responsibility are essentially preserved’ (para 5 of the proposal), although it aims to expand the family definition and allow for more flexible evidentiary rules in order to facilitate family reunification mostly in line with the approach here suggested.

136 Given the difficulties inherent in the asylum process, it would be equally important to avoid preventing partners from enjoying family reunification with SOGI claimants/refugees in the event they qualify for international protection as well, if they wish to. Recital 38 of the proposed Qualification Regulation should be revised accordingly.

137 EU Commission, *supra* n 134 at para 6.1.

138 *Ibid.*

139 Ritholtz and Buxton, *supra* n 7.

a more cautious approach. In fact, a change in European and national legislation would have more chances to ensure immediate protection to people fleeing homophobia and transphobia if it is clearly anchored to the current evolution of human rights standards on family life and the protection of children. To this day, such an evolution hardly covers queer kinship, being mostly based on the reproduction of the same heteronormative structure of family when it comes to the protection of SOGI families. A more ambitious approach would lead to questioning even the values on which human rights themselves are currently based, which is a process that does not fit the urgency of immediate needs of SOGI claimants and refugees.

In sum, only an approach based on clear principles for interpreting and implementing law in a way that facilitates the enjoyment of human rights protecting private and family life and, to the greatest extent possible, contests heteronormative, homonormative and culturally biased notions may combat the legal violence currently inflicted on SOGI claimants and refugees. Simultaneously, it may empower this group by ensuring that their intimate and family relationships are finally visible, socially recognized and legally protected.

7. CONCLUSION

Bringing the teenage years of SOGI minorities to light for the first time in the Italian context, Paterlini stated in a seminal queer book that owing to the silence around the topic, ‘it does not exist. Prostitution, violence [against young LGBTIQ+ people], yes, these come out a lot. Normality remains totally buried, or better, removed.’¹⁴⁰ Something similar seems to happen to intimate and family relationships of SOGI asylum claimants and refugees. Law renders invisible these relationships, unless these are depicted in terms of suffering and abuse. This invisibility inflicts violent effects on claimants, refugees and their children, and translates into a silence that perpetuates a system that does not address their family-related rights and needs.

This article has demonstrated how the content and the implementation of European asylum and family legal frameworks produce serious forms of legal violence. Focusing on the intimate and family relationships of SOGI claimants, we captured ‘the normalized but cumulatively injurious effects of the law’,¹⁴¹ which shape and often erase SOGI claimants’ life experiences to fit pre-conceived hetero- and homonormative notions of sexuality, intimacy, love and family. In doing so, the analysis has stressed the increasing contradiction between the assessment of past and current love and family bonds during the asylum determination and the (lack of) protection that the European framework offers to SOGI claimants and refugees when these relationships exist.

To move towards better legal frameworks as well as a fairer implementation of European and national law, we have advocated in favour of a principled approach based on human rights. Despite its limits in addressing all queer ‘chosen’ ties, the suggested reforms would lead to asylum systems that are designed and implemented in a way that acknowledges the social and legal experiences of SOGI claimants and refugees and ensures that their intimate and family relationships are protected by the right to private and family life as enshrined in the ECHR and, where applicable, the CFR. This includes

140 Paterlini, *Ragazzi che amano ragazzi* (1998) at 1 (our translation).

141 Menjivar and Abrego, *supra* n 28 at 1380.

avoiding requirements that this group could hardly satisfy when they wish to enjoy, or build a new, family life. It entails that considerations based on the best interests of the child should also be an integral part of SOGI asylum. Significantly, this rights-based approach can also contribute to treating more fairly SOGI minority asylum claimants with claims based on persecution on non-SOGI grounds, as well as other claimants and refugees with non-traditional families. It is imperative that we fight the instances of ‘state-sanctioned brutality’ we explored in this article.¹⁴² This may seem like a utopia, but ‘[c]oncrete utopias are the realm of educated hope.’¹⁴³

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142 Lee, *supra* n 38 at 85.

143 Muñoz, *Cruising Utopia: The Then and There of Queer Utopia* (2009) at 3.