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Gert Vermeulen, Nina Peršak
& Stéphanie De Coensel *(Eds.)*

Researching the boundaries of **sexual integrity, gender violence and image-based abuse**

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International Review of Penal Law
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Edited by

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A WAY FORWARD: CRIMINAL LAW AS A POSSIBLE REMEDY IN ADDRESSING GYNAECOLOGICAL AND OBSTETRIC VIOLENCE?

*Lorenzo Bernardini and Sara Dal Monico**

Abstract

This paper evaluates the potential of criminal law as a remedy to address gynaecological and obstetric violence (GOV). Despite its prevalence, GOV remains underreported due to societal stigma and insufficient legal recognition at both international and regional levels. The paper begins by addressing the absence of a universally accepted legal definition of GOV, framing it as a violation of women's human rights. It then explores the efficacy of criminal law in addressing the multifaceted nature of GOV, which encompasses physical, mental, and emotional abuses. Drawing on the experiences of Venezuela and France, the paper highlights the divergent legal approaches to defining and criminalizing GOV. Venezuelan legislation provides a detailed definition focusing on the dehumanizing treatment and loss of autonomy experienced by women, whereas the recent French proposal broadens the scope to include sexist offences within obstetric and gynaecological care. The paper argues for the preference of the broader concept of GOV over obstetric violence (OV) to encompass abuses occurring in various reproductive health contexts. Furthermore, it examines international and regional human rights frameworks, including the jurisprudence of the CEDAW Committee and the Inter-American and European Courts of Human Rights, identifying GOV as a form of gender-based violence and potential inhuman or degrading treatment. The discussion then focuses on the shortcomings of tort and disciplinary law in addressing GOV, advocating for criminal law as a more effective deterrent and means of societal education. Ultimately, the paper calls for a nuanced approach, combining legal reform with educational initiatives to eradicate the cultural norms perpetuating GOV.

1 Defining gynaecological and obstetric violence

1.1 Recent attempts to legally define Gynaecological and Obstetric Violence: lessons from the Venezuelan and French experiences

Gynaecological and obstetrical violence (GOV) is not a recent phenomenon: 'it is the result of the continued existence of a patriarchal culture within the medical sector, particularly in the training given to health care staff, and of persistent gender stereotypes in society'.[1] Although neither new nor recent, legal systems internationally lack a legally

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[1] Maryvonne Blondin, 'Obstetric and Gynaecological Violence' (Explanatory Memorandum by the rapporteur to the Committee on Equality and Non-Discrimination 2019) Doc. 14965.

binding definition of GOV, with but a few exceptions located in Latin America (to define obstetric violence though) and despite the international attention that this particular form of violence has received in the last few years. Within the human rights law framework, no legally binding definition of GOV can be found either.

The current understanding of obstetric violence (OV) was conceived at the Conference on the Humanization of Childbirth held in Fortaleza, Brazil in 2000. At the conference 12 Latin American countries met and funded the RELACAHUPAN–*Red Latinoamericana y del Caribe para la Humanización del Parto y Nacimiento,* a network and platform for activists, researchers and healthcare providers to meet and discuss child-birth related issues.[2] The conference and the results it built upon gave rise a few years later to the first legal attempts at providing a definition of OV. Indeed, in 2007 Venezuela passed the Organic Law on Women's Right to a Violence-free Life, which included the first legally binding definition of OV. Art. 15(13) stated that OV entails:

> The appropriation of a woman's body and reproductive processes by health personnel, in the form of dehumanising treatment, abusive medicalization and pathologization of natural processes, involving a woman's loss of autonomy and of the capacity to freely make her own decisions about her body and her sexuality, which has negative consequences for a woman's quality of life.[3]

In contrast, there are no specific laws addressing or criminalizing GOV within the European legal frameworks[4]. The only attempt is rather recent and was offered by the French

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[2] Patrizia Quattrocchi, 'Obstetric Violence Observatory: Contributions of Argentina to the International Debate' (2019) 28 Medical Anthropology 8, 763; Sara Larrea and others, 'Hospitals have some procedures that seem dehumanising to me: experiences of abortion related obstetric violence in Brazil, Chile and Ecuador' (2021) 3 Agenda 55. On the subject of GOV and attempts to define it, see Camilla Pickles, '"Obstetric Violence", "Mistreatment" and "Disrespect and Abuse": Reflections on the Politics of Naming Violations During Facility-based Childbirth' (2022) 38 Hypatia, 628-649; Michelle Sadler and others, 'Moving beyond disrespect and abuse: addressing the structural dimensions of obstetric violence' (2016) 24 Reproductive Health Matters 47; Ana Cristina Ferrão and others, 'Analysis of the concept of obstetric violence: scoping review control' (2022) 12 Journal of Personalized Medicine 7, 1090; Rachelle Chadwick, 'The dangers of minimizing obstetric violence' (2023) 29 Violence Against Women 9, 1899-1908. Karen Brennan, 'Reflections on Criminalising Obstetric Violence. A Feminist Perspective' in Camilla Pickles and Jonathan Herring (eds), *Childbirth, Vulnerability and Law. Exploring Issues of Violence and Control* (Routledge 2019) 246.

[3] OAS MESECVI, 'Second Hemispheric Report on the Implementation of the Belém Do Pará Convention' (2012) available at: <https://www.oas.org/en/mesecvi/docs/mesecvi-segundoinformehemisferico-en.pdf> (all websites accessed 1 June 2024).

Two years later, Argentina followed and adopted Law No. 26.485 'Ley de Proteccion Integral A Las Mujeres' (1 April 2009), which includes a definition of OV at Art. 6(f). The latter provision provides a list of manifestations of forms of violence against women (VAW).

[4] See: Silvia Brunello and others, 'Obstetric and Gynaecological Violence in the EU – Prevalence, legal frameworks and educational guidelines for prevention and elimination' (2024) available at: < https://www.europarl.europa.eu/RegData/etudes/STUD/2024/761478/IPOL_STU(2024)761478_EN.pdf>.

legislator in 2023. The French draft proposal can be considered a pivotal starting point in Europe, defining this particular form of violence as:

> Sexist offences committed in the context of obstetric and gynaecological care, imposing on a person any sexual or sexist comments or behaviours that either violate their dignity by being degrading or humiliating, or create an intimidating, hostile or offensive context, will now be clearly recognised as obstetric and gynaecological violence, and considered as an aggravated form of this offence.[5]

Rather than the similarities, noteworthy are the differences which can be detected in the Latin American countries' notions and in the French one: Venezuela (and Argentina) have referred in their legislative acts to *obstetric violence*, while the draft proposal currently discussed in France offers a wider perspective, identifying the phenomenon more broadly as *gynaecological and obstetric violence*. As it will be argued within these pages, the notion of GOV should be preferred over OV, as it offers a wider concept appreciative also of other reproductive health services. OV alludes to an experience limited to childbirth or to health-related services resulting in childbirth, leaving similar forms of violence that happen in the wider context of reproductive services, such as abortion, unaddressed.[6] Indeed, GOV does not only occur within the boundaries of the delivery room, but it indicates a much more complex pattern of abuses, both physical and verbal, occurring before, during and after a pregnancy, or in the wider context of reproductive

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[5] Proposition de loi n° 982 (2023). Translation from French to English done by the author. The original text reads as follows: 'Les outrages sexistes commis dans le cadre d'un suivi obstétrical et gynécologique, soit le fait d'imposer à une personne tout propos ou comportement à connotation sexuelle ou sexiste qui soit porte atteinte à sa dignité en raison de son caractère dégradant ou humiliant, soit crée à son encontre une situation intimidante, hostile ou offensante dans ces cadres, seront dorénavant reconnus clairement comme des violences obstétricales et gynécologiques, et considérés comme une forme aggravée de cette infraction'. Available at: <https://www.assemblee-nationale.fr/dyn/16/textes/l16b0982_proposition-loi>.

[6] Larrea and others (n 2) 55, 56. The authors recall the underreported and under-debated status of abortion-related OV, suggesting that similar forms of violence take place also in contexts of pregnancies not necessarily resulting in childbirth, but rather descriptive of a systematic form of violence occurring before, during and after accessing sexual and reproductive healthcare services. They recall several accounts of women who describe the humiliations and dehumanising and slandering comments which they had to suffer at the hands of the medical staff during their hospitalisation to undergo abortion procedures. In this regard, see also Quattrocchi (n 2) and Pickles (n 2). Interestingly, both Merriam Webster Dictionary and Cambridge Dictionary state that the word "obstetric" refers to pregnancy and childbirth, hence suggesting that the obstetric dimension has to result in the birth and delivery of a child. Therefore, instances of violence happening in the context of abortion risk being overlooked or left out from such a definition. To provide an example in this regard, Italian obstetric personnel are not involved in abortion care, while the gynaecological staff is (see 'Chi è l'ostetrica' available at <https://www.fnopo.it/chi-e-l-ostetrica>).
Besides, as anticipated, the French 2023 legislative proposal aims at introducing the crime of GOV (not just OV) in its national legal framework. The text of the *Proposition de loi* (n 4) specifically refers to instances of violence which can occur also during consultations. The proposal states that: '*Il semble cependant essentiel, dans la lutte contre les violences faites aux femmes, de nommer les choses et d'employer l'expression « violences obstétricales et gynécologiques » non seulement pour définir mais aussi pour qualifier des faits répréhensibles*', enhancing the standpoint that in order to better identify the phenomenon and grasp its many features, a wider notion is to be favoured.

and sexual health. What emerges more clearly from the Venezuelan definition though is the notion of lack of *consent*. Indeed, one of the characterising features of GOV is that it makes women feel they are unable to provide their consent, and if they are able to, such consent is not sufficiently informed.[7]

1.2 Identifying conducts of GOV

Attempting to provide a comprehensive definition of GOV is thus not an easy endeavour. However, some efforts have been made at the international level in this regard. The Special Rapporteur on Violence against Women, Dubravka Šimonović drafted a report dedicated to GOV (although, it should be highlighted that the report refers to it as OV) in 2019. She specifically identified several practices which can amount to this form of violence. The Special Rapporteur referred to OV as 'manifestations of gender-based violence in reproductive health care services'.[8] Indeed, GOV can be ascribed to the wider context of sexual and reproductive health services, rather than only childbirth.[9] The Special Rapporteur, without indicating any 'catalogue', included in her analysis manifestations of ill-treatment and gender-based violence in reproductive health services symphysiotomy;[10] forced sterilizations and forced abortions;[11] physical restraint during labour and post-childbirth; unnecessary c-sections; episiotomy; overuse of synthetic oxytocin to induce contractions; the Kristeller manoeuvre; unnecessary vaginal examinations; the so-called 'husband' stitching.[12] All these practices are accompanied by profound humiliations and verbal abuses and performed without the fully formed consent of the patients, who reported lack of autonomy and decision-making when claiming to have suffered GOV.[13]

From a scholarly perspective, an important contribution to the academic debate on GOV was provided by Elizabeth Kukura.[14] In her analysis, she identified specific conducts amounting to GOV. She specifically suggests categorizing those behaviours into three

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[7] In those cases brought before the European Court of Human Rights (ECtHR) concerning GOV, the applicants – who were forcibly sterilized by the medical staff – alleged not fully understanding what the practice of sterilization *actually* entailed and that it was not reversible when they were required to sign a form to undergo the procedure *VC v Slovakia* [2011] ECtHR Appl. No. 18968/07; *NB v Slovakia* [2012] ECtHR Appl. No. 29518/10. The applicants' poor reading skills and lack of deep knowledge of the language spoken by the physicians was also unaccounted.

[8] Dubravka Šimonović, 'A Human Rights-Based Approach to Mistreatment and Violence against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence' (Special Rapporteur on violence against women, its causes and consequences 2019) A/74/137.

[9] Ibid.

[10] The surgical separation and widening of the pelvis to facilitate childbirth. See Šimonović (n 8) 20.

[11] Ibid, 21. See Daniela Alaattinoğlu, 'Article 39 – Forced abortion and forced sterilization' in Sara De Vido and Micaela Frulli (eds), *Preventing and Combating Violence against Women and Domestic Violence: A Commentary to the Istanbul Convention* (Edward Elgar Publishing 2023) 471-481.

[12] Procedure according to which women after an episiotomy are stitched tightly to supposedly increase the husband's pleasure during the first sexual intercourse after delivery. See Šimonović (n 8), 29.

[13] Ibid, 30-31.

[14] Elizabeth Kukura, 'Obstetric Violence' (2018) 106 The Georgetown Law Journal, 721, 801. She starts from the definition provided by the WHO, hence she did not attempt to provide one.

groups: (i) *abuse*, which includes forms of forced surgeries and unconsented medical procedures, up to sexual violations and physical restraints;[15] (ii) *coercion,* entailing coercion by judicial interventions, child welfare interventions or by withholding treatments; (iii) *disrespect*, which the author defines as 'subtle humiliation'[16]. This categorization is particularly helpful with regard to behaviours of 'abuse' and 'coercion', yet in regard to 'disrespect' the interpretation offered by the Special Rapporteur is more comprehensive, accounting for profound humiliation, verbal abuse and sexist remarks which is appreciative of the wider dimension this form of GOV takes and of the gender-based nature of the phenomenon, which is supported within these pages.[17]

2 Framing GOV as a violation of women's human rights

2.1 At the international level

At the international level, within the UN context, OV was acknowledged by both the WHO and by the aforementioned mentioned report by the Special Rapporteur on Violence against Women, where a definition of the phenomenon was adopted in the following terms: OV is 'the kind of violence experienced by women during facility-based childbirth'.[18] The WHO had also shown concerns over the widespread mistreatment of women during childbirth in medical facilities, and it issued a statement condemning the practice. It addressed the issue not only as a violation of women's right to 'respectful care' but also as a violation of their rights to life, health and bodily integrity as well as freedom from discrimination.[19] Interestingly, the WHO referred to disrespectful and abusive treatment during childbirth as follows, without precisely naming the phenomenon as gynaecological and obstetric violence:

> Outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedures (including sterilisation), lack of confidentiality, failure to get fully informed consent, refusal to give pain medication, gross violations

[15] Ibid (n 8). In *Manuela et. al v El Salvador* the Inter-American Court of Human Rights (IACtHR) identified the restraining of the applicant who was shackled to her hospital bed as a form of OV amounting to torture or cruel, inhuman or degrading treatment. *Manuela and others v El Salvador* [2022] IACtHR Series C No. 282.
Moreover, the Special Rapporteur on torture indicated that 'the use of shackles and handcuffs on pregnant women during labour and immediately after childbirth is absolutely prohibited'. The Special Rapporteur on Violence against women added that such measures may amount to forms of violence against women and human rights violations, including OV. See Juan E. Méndez, 'Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment' (2016) A/HRC/31/57 and Šimonović (n 8).
[16] Kukura (n 14).
[17] Ibid, 31. The report mentions women being mocked, scolded, insulted and yelled at as well as being subjected to sexist and offensive remarks.
[18] Šimonović (n 8) 12. It should be mentioned that the report refers to the practices as OV, not as GOV.
[19] WHO, 'The prevention and elimination of disrespect and abuse during facility-based childbirth' (2015) available at: <https://iris.who.int/bitstream/handle/10665/134588/WHO_RHR_14.23_eng.pdf?sequence=1>.

of privacy, refusal of admission to health facilities, neglecting women during childbirth to suffer life-threatening, avoidable complications, and detention of women and their new-borns in facilities after childbirth due to an inability to pay.[20]

There have been attempts also at the regional level to address the issue of GOV. At the Inter-American level, the Follow-Up Mechanism (MESECVI) to the Belém Do Pará Convention drafted a report in which the criminalisation of OV practices was fostered. Not only State Parties were urged to make OV-related behaviours a criminal offence, but were also invited to define and elaborate on how to ensure a 'natural process' before, during and after childbirth.[21] Similarly, at the European level, OV issues have been tackled on in two specific instances. It is worth mentioning, firstly, the 2019 Parliamentary Assembly of the Council of Europe (PACE) report,[22] and, secondly, the PACE Resolution specifically dedicated to GOV (not just *obstetric* violence, OV), in which the Assembly acknowledged that GOV is a growing but underreported phenomenon[23] and recalled the definitions provided for in the Venezuelan and Argentinian laws. It also recalled that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter Istanbul Convention) condemns and includes forced sterilizations and abortions ad conducts to criminalise, yet it does not specifically address them as GOV. Secondly, it is worth mentioning Resolution 2020/2215(INI) on sexual and reproductive health and rights with a particular focus on women rendered by the European Parliament in 2021, mentioning GOV with regard to the challenges in collecting data on the phenomenon, given the fear and stigma suffered by women who (tend not to) report such abuses, and urging Member States to do their utmost to prevent and combat GOV.[24] Furthermore, in April 2024 the FEMM Committee of the European Parliament published a comprehensive study on GOV in the EU, its prevalence and educational guidelines for prevention and elimination. The report stresses the lack of a consensus on the definition of GOV and highlights conducts which have been identified as such within the legal frameworks of some of the MS.[25]

2.2 In the quasi-jurisprudence of CEDAW Committee

The quasi-jurisprudence of the CEDAW Committee has been significant in framing the issue of GOV from a human rights perspective within the framework of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), although again it should be mentioned that the Committee referred to the practice as OV.

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[20] Ibid.

[21] With this, the MESECVI stressed the need to develop an environment in which women would feel safe and in control of making informed decisions and that their consent would be required for procedures they would have to undergo. See MESECVI (n 3).

[22] Blondin (n 1).

[23] PACE, 'Obstetrical and Gynaecological Violence', Resolution 2306(2019): 'Obstetrical and gynaecological violence is a form of violence *that has long been hidden and is still too often ignored*' (ibid, 3).

[24] European Parliament, 'Resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health' (2021) Res. 2020/2215(INI).

[25] Brunello and others (n 4).

The Committee never ventured as far as to provide a definition of GOV, upholding the *status quo* – so far, there is no specific provision on GOV and the right to be free from it in international human rights law. Hence, the contribution of human rights treaty bodies and human rights courts is of paramount importance in framing the issue in relation with other human rights. The specific contribution of the CEDAW Committee was also crucial in establishing two features at the basis of GOV: (i) it is a form of gender-based violence against women and (ii) it amounts to a violation of women's human rights (in particular their right to reproductive health). The Committee dealt with OV in three separate cases, all brought against Spain: *SFM v Spain* (2020)[26]; *NAE v Spain* (2022)[27] and in *MDCP v Spain* (2023).[28]

In *SFM v Spain,* the Committee found a violation of the applicant's rights under Art. 2(b)(c)(d) and (f), 3, 5 and 12 of the CEDAW Convention. In her claim, the applicant alleged procedures, which she had to undergo without her prior informed consent, such as early induced labour, forced lithotomy position during childbirth and an episiotomy alongside repeated (unnecessary) vaginal exams and being separated from her daughter. Moreover, the stereotypes that were at the basis of the mistreatment she suffered at the hospital were also prolonged during administrative and judicial proceedings, violating her rights to be free from discrimination altogether.[29] Importantly, the Committee urged Spain to 'ensure access to effective remedies in cases in which women's reproductive health rights have been violated, including in cases of obstetric violence'.[30]

Similarly, in *NAE v Spain* the CEDAW Committee acknowledged the same breach of the applicant's fundamental rights enshrined in the CEDAW Convention. Specifically, it set forth that Spain had violated its obligation to take all appropriate measures to modify or abolish laws and regulations as well as customs and practices resulting in forms of discrimination against women and considered that 'stereotyping affects the right of women to be protected against gender-based violence, in this case obstetric violence'.[31] The Committee also found a violation of the applicant's sexual and reproductive health rights, including the access to safe and high quality maternity free from discrimination.[32] In her account, the applicant reported being induced into early labour through oxytocin and

[26] *SFM v Spain* [2020] CEDAW C/75/D/138/2018.
[27] *NAE v Spain* [2022] CEDAW/C/82/D/149/2019.
[28] *MDCP v Spain* [2023] CEDAW/C/84/D/154/2020.
[29] *SFM v Spain* (n 25) 7.2, 7.3.
[30] Ibid, para 8(iv).
[31] *NAE v Spain* (n 27) para 15.8.
[32] CEDAW had issued a General Recommendation on women and health in 1999, namely General Recommendation No. 24, in which it tackled the issue of quality health care services. These are according to the Committee, services delivered in a way that ensures the prior informed consent of women is collected before procedures, respecting her dignity and confidentiality. See CEDAW, 'General Recommendation No. 24: Article 12 of the Convention, Women and Health' [1999].

underwent a caesarean c-section;[33] she was tied down and denied food, separated from her baby and forced to bottle-feed her. On top of that, the constant infantilization towards her and the outright disrespect altogether led to physical and psychological consequences.[34]

Finally, in *MCPD v Spain*, the applicant alleged being repeatedly denied medications to ease the pain for a hiatal hernia she was suffering from and forced to dilate in the lithotomy position against her will, making her sick and causing her constant reflux.[35] She was forced to undergo an unnecessary caesarean cut to deliver her baby, against her and her husband's will, since – as she reports having overheard – all the delivery rooms were full.[36] The Committee ruled in favour of the applicant, upholding that in many cases of GOV, the practice of caesarean deliveries is performed without an actual medical necessity, but mostly due to economic or time related reasons. As found in legal circles, in countries where the higher the number of deliveries correlates to a greater income for the healthcare facility, c-sections have been abused to ensure a higher rate of deliveries per day to maximize the economic gains.[37]

2.3 In the case-law of the Inter-American Court of Human Rights and the European Court of Human Rights

As mentioned, regional human rights courts have also dealt with GOV issues. Their precious efforts have certainly helped to develop further the understanding of this form of gender-based violence. Both the Interamerican Court of Human Rights' (hereinafter IACtHR) and the European Court of Human Rights' (hereinafter ECtHR) settled case-law is particularly relevant, as was the case for the decisions rendered by CEDAW, in framing this form of violence within the context of human rights violations. Although both Courts have dealt with forms of GOV and found that it could amount to torture, inhuman or degrading treatment, the standpoint adopted is different.

The IACtHR has been particularly receptive to the phenomenon of GOV and has offered insightful reasonings as to what constitutes GOV and to the human rights violations it entails. The Court dealt with the issue in several cases, brought against Argentina,[38] Bolivia[39] and El-Salvador,[40] stressing the gender-based nature of GOV. Among those cases,

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[33] The practice of performing unnecessary c-sections is recurrent in accounts of women having experienced GOV and has been documented also within the literature, see for instance: Amy SM Lee and Maggie Kirkman, 'Disciplinary Discourses: Rates of Cesarean Section Explained by Medicine, Midwifery and Feminism' (2008) 29 Health Care for Women International 5, 448-467.

[34] *NAE v Spain,* (n 26) para 15.7-8.

[35] *MDCP v Spain* (n 28) para 2.3.

[36] Ibid, para 2.4.

[37] Lee and Kirkman (n 33); Zabun Nahar and others, 'Unnecessary Cesarean Section Delivery Causes Risk to Both Mother and Baby: A Commentary on Pregnancy Complications and Women's Health' (2022) 59 Inquiry, 1-4.

[38] *Brítez Arce et al v Argentina* [2022] IACtHR Series C No. 474.

[39] *IV v Bolivia* [2022] IACtHR Series C No. 329.

[40] *Manuela and others v El Salvador* [2022] IACtHR Series C No. 282.

Manuela and others is relevant in as much as the IACtHR found that the kind of violence perpetrated against the applicant (which amounted to OV in the eyes of the Court) amounted to torture and inhuman or degrading treatment. Manuela alleged having given birth to a stillborn prematurely in 2008, but at the hospital, the medical staff who was treating her, suspected she had performed an abortion to get rid of her baby. Hence, the physicians treating the applicant initiated proceedings against her, as they suspected that she had procured the abortion herself. She was later detained while receiving treatment, yet she was subjected to neglect and shackled to the bed because she was a presumed baby-killer.[41]

On the other hand, the ECtHR has dealt with forms of GOV only in two instances and focussing on a very specific behaviour, namely forced sterilization, which the Court, however, did not name precisely as GOV. In *V.C. v Slovakia* the ECtHR found that the forced sterilization of a woman of Roma ethnic origin amounted to a violation of Art. 3 ECHR. The applicant reported being segregated within the hospital, being prevented from using the same facilities as non-Roma women, her ethnic origin labelled on her charts and confined to a room with only other Roma women. She was sterilised, as the staff informed her that another pregnancy could be fatal for her or her baby, though she was not fully informed of what sterilisation meant, as she did not understand the term.[42]

The Court reached the same conclusion in *N.B. v Slovakia*, where a young woman of Roma ethnic origin was again forcibly sterilised by the medical staff without her fully informed consent.[43] In the judgments, the ECtHR did not refer to what the applicants endured precisely with the term *obstetric violence* – as opposed to the bolder approach taken by the IACtHR – yet the literature on the matter clearly identifies forced sterilization procedures as a form of OV.[44] Therefore, it could be argued that certain forms of GOV can even amount to torture or inhuman or degrading treatment, however, this case cannot be inferred for every conduct attributable to GOV, as this notion is an 'umbrella term' which includes different types of behaviours, both physical and verbal. What can be stated – and which will be more thoroughly developed in the following paragraphs – is that no matter the conduct, GOV is a form of gender-based violence disproportionately affecting women and a violation of their human rights.

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[41] Ibid.

[42] VC v Slovakia (n 7).

[43] NB v Slovakia (n 7).

[44] The report by the Special Rapporteur included forced sterilization, stating that forced sterilization is a crime and a form of gender-based violence against women. The psychological element behind these behaviours is highlighted, stressing the social and cultural feature that sees women belonging to certain groups as not being fit for procreation or for being mothers. See Šimonović (n 8) 21 and, in this vein, Catherine Van de Graaf 'Obstetric Violence and the European Court of Human Rights' (2021) available at: <https://www.humanrightsincontext.be/post/obstetric-violence-and-the-european-court-of-human-rights>.
The Instanbul Convention, indeed, has included a provision (Art. 39) which lays down an obligation burdening on State Parties to criminalise both forced sterilisation and forced abortion. For broader considerations, see Alaattinoğlu (n 11).

3 GOV as Gender-based Violence against Women and Inhuman or Degrading Treatment

GOV practices imply serious violations of women's human rights. First and foremost, women's rights to sexual and reproductive health are breached in cases of GOV. The 'appropriation of women's reproductive processes' – recalling the Venezuelan definition of the phenomenon – may highlight the infringement of their sexual and reproductive rights, taking away or impairing women's ability to decide *vis-à-vis* their (very sensitive) reproductive choices.[45] It therefore entails a violation of their right to health more broadly.[46] GOV infringes also on the right to bodily integrity and autonomy of women. Practices such as forced sterilization, episiotomies and symphysiotomies, as well as being physically restrained, usually performed without the full consent of the patient encroach upon their bodily integrity and the possibility to make autonomous and informed decisions over their own bodies.[47] GOV can also entail violations of the right to non-discrimination and equality, which is underlined by the gendered nature of the phenomenon, which affects women disproportionately.[48]

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[45] This is true in cases of physical abuse, where the physical element of the appropriation by the medical staff of women's reproductive processes is exemplified, eg, by forced sterilizations. It is also true however in cases of verbal abuse, which hinders women's psychological health, causing them suffering and leading them to feel dehumanized.
On women's sexual and reproductive rights, see, among others, Center for Reproductive Rights, 'Los derechos reproductivos son derechos humanos' available at: <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRHR_span_0906_quinta.pdf>; Alice M Miller, 'Sexual but not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights' (2000) 4 Reproductive and Sexual Rights 2, 68-109; Claudia García-Moreno and Heidi Stöckl, 'Protection of sexual and reproductive health rights: addressing violence against women' (2009) 106 International Journal of Gynaecology and Obstetrics 144-147; Claudia García-Moreno and Shirin Heidari, 'Gender-based Violence: a barrier to sexual and reproductive health and rights' (2016) 24 Reproductive Health Matters 47, 1-4; Rebecca Cook, 'International Human Rights and Women's Reproductive Health', in Susan Sherwin and Barbara Parish (eds), *Women, Medicine, Ethics and the Law* (Routledge 2002); Asha Moodley, 'Defining Reproductive Rights' (1995) 27 Agenda 8-14.

[46] 'Sexual and reproductive health is also a key aspect of women's right to health'. See WHO, 'The Right to Health: Fact Sheet No. 31' (2008) available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>. One notable contribution related to VAW's health, see Sara De Vido, *Violence Against Women's Health in International Law* (Manchester University Press 2020). On the same topic, see Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge 2014); Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' (1993) 24 Studies in Family Planning 2, 73-86; García-Moreno and Stöckl (n 45).

[47] WHO (n 19) and Šimonović (n 8) 5, 8, 66. The violation of the right to bodily integrity was also found by the IACtHR in *IV v Bolivia* (n 39), a case related to a forced sterilization procedure.

[48] The issue of intersex, non-binary or transgender people who have a uterus, who can be victims of GOV and possibly, following an intersectional approach, additional discriminations because of their gender goes beyond the scope of this paper. What emerges however from the data is that GOV disproportionately affects women. See Šimonović (n 8) and PACE Report (n 23).
See also the findings by CEDAW Committee, which found discriminations based on gender stereotypes perpetuating stigmas on women's bodies and the traditional roles of patriarchal societies. *Supra* para 2.2.

Claiming that GOV is a gendered form of violence is supported by both the international and regional case-law and the literature on the matter, as well as by the attempts to address the phenomenon at the international level.[49] GOV is thus a gender-based phenomenon,[50] embedded in the social stereotypes revolving around a particular view of women because they do not fit within predetermined and gendered roles. As aptly pointed out by Pickles, OV 'provides a name for the reproduction of gender inequalities and racial and socioeconomic discrimination as these manifest in clinical maternity care settings'.[51] Furthermore, the Special Rapporteur framed GOV as part of 'continuum of the violations that occur in the wider context of structural inequality, discrimination and patriarchy'.[52]

GOV may also amount to torture, inhuman or degrading treatment according to the IACtHR's case-law. What emerges so far, though, is that only instances of *physical* violence have been considered as torture or inhuman or degrading treatment, such as were the cases of forced sterilizations in *VC v Slovakia* and *NB v Slovakia* and in *IV v Bolivia*. To recall Kukura's conceptualization of conducts of OV, this case-law seems to include 'abuse' and 'coercion' into what amounts to GOV, leaving aside the *verbal abuse*. An argument could be made however to also consider the verbal violence which is perpetrated against women in cases of GOV as amounting to inhuman or degrading treatment. Sexist remarks, profound humiliations and verbal abuses can lead to serious psychological harm and suffering for women, up to what some women have reported as dehumanizing.[53]

Framing GOV as a human rights violation and a form of gender-based violence against women should lead to an additional consideration, namely that this phenomenon is embedded in the social structures of patriarchal societies and cannot be therefore only addressed from a legal perspective. The many-sided and intersectional aspects of GOV should not be overlooked in legal analysis, nonetheless. Legal considerations should delve into the law's ability to deal with the issue, mindful of its potential as well as of its limits.

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[49] See paragraphs above.

[50] See Maria TR Borges, 'A Violent Birth: Reframing Coerced Procedures During Childbirth as Obstretric Violence' (2018) 67 Duke Law Journal 827-862; Larrea and others (n 2); Kukura (n 14); Farah Diaz-Tello, 'Invisible Wounds: Obstetric Violence in the United States' (2019) 24(47) Reproductive Health Matters 56-64; Rogelio Peréz D'Gregorio, 'Obstetric Violence: A New Legal Term Introduced in Venezuela' (2010) 111 International Journal of Gynecology and Obstetrics 201-202; Juliana Tamayo Muñoz and others, 'Obstetric Violence and Abortion. Contributions to the Debate in Colombia' (2015) available at: <https://globaldoctorsforchoice.org/wp-content/uploads/Obstetric-Violence_and_Abortion_EN-final-1.pdf>; Women Help Women (WHW), 'Obstetric Violence and Abortion' (2017) available at: < https://women-help.org/it/page/1196/obstetric-violence_en>.

[51] Pickles (n 2) and Paola M Sesia, 'Naming, framing and shaming through obstetric violence: A critical approach to the judicialisation of maternal health rights violations in Mexico. In Critical medical anthropology: Perspectives from Latin America' in Jennie Gamlin and others (eds), *Critical Medical Anthropology* (UCL Press 2020) 222-247.

[52] Šimonović (n 8) 9.

[53] Larrea and others (n 1).

4 Legal interventions against GOV—Might Criminal Law Be a Necessary and Effective Remedy?

The recognition of GOV as a multifaceted phenomenon, encompassing a variety of behaviours and necessitating a multidisciplinary approach for its identification (including perspectives from social sciences, medicine, and law), invites a scholarly inquiry into the capacity and extent to which legal frameworks are properly equipped to tackle this issue. Specifically, given the characterization of GOV as a pervasive global health challenge that disproportionately affects women worldwide – particularly those from minorities or vulnerable groups or those encumbered by socioeconomic disadvantages –,[54] it is of paramount importance to examine the *scope* and the *effectiveness* of legal instruments that national systems have utilized or might utilize to confront this escalating concern.

4.1 As Band-Aids on Deep Wounds: The Scant Relief of Tort Law and Disciplinary Measures in Combatting GOV

If stripped of their classification under GBV, practices of GOV may be characterized as harmful actions frequently executed neither with the informed consent of the patient nor out of any medical necessity.[55] These actions, previously identified as instances of 'abuse' or 'coercion', are often undertaken without a health-based justification – predominantly motivated by considerations of efficiency – or without genuine patient consent (where consent, though formally obtained, is granted without a comprehensive understanding of the implications involved).

Against this background, it is hardly surprising that women subjected to GOV practices have frequently resorted to *tort law* for recourse, contending that the medical actions were marred by negligence or that the healthcare provider breached the duty of care.[56]

[54] See, with a specific focus on black women, Colleen Campbell, 'Medical Violence, Obstetric Racism, and the Limits of Informed Consent for Black Women' [2021] Michigan Journal of Race & Law 47; or, with regard to poor women, Kukura (n 14) 721, 734, 750 and 762.

[55] In this regard, see, specifically, Nathalie Boudet-Gizardin, 'Violences gynécologiques et obstétricales : comment restaurer la confiance réciproque entre patientes et professionnels de santé ?' (2023) 37 Journal du Droit de la Santé et de l'Assurance - Maladie (JDSAM) 10, 13; Sophie Paricard, 'Le défaut de consentement à l'examen gynécologique constitue-t-il un viol?' (2023) 37 Journal du Droit de la Santé et de l'Assurance - Maladie (JDSAM) 18; Rachelle Chadwick, 'Breaking the Frame: Obstetric Violence and Epistemic Rupture' (2021) 35 Agenda 104.

[56] On medical negligence and 'duty of care' standards between tort law and criminal law, see Daniele Bryden and Ian Storey, 'Duty of Care and Medical Negligence' (2011) 11 Continuing Education in Anaesthesia Critical Care & Pain 124.

This legal avenue is available, among others, in the US,[57] UK,[58] Belgian,[59] Spanish,[60] French,[61] Chinese[62] and Brazilian[63] legal frameworks. Relying on tort law may depict victims' pursuit of acknowledgment and redress for the breach of ethical and professional standards in their gynaecological and obstetrical treatments, highlighting the intersection between legal accountability and healthcare delivery in the context of GOV.[64] After all, with its foundation in the redress of civil wrongs through compensation, tort law offers a path for victims to seek reparation for harm suffered.

However, its reliance on individual action and the burden of proof placed upon the claimant – often making it a daunting and retraumatizing process for the latter – can render it an arduous route in the context of GOV, often inaccessible to those lacking the resources or knowledge to navigate the legal system,[65] *a fortiori* where women are not completely aware that what they experienced can be considered harmful or abusive.[66]

What is more, the burden of proof falls squarely upon the patient, who is tasked with the tough challenge of gathering all necessary evidence to present the case before a civil court, demonstrating not only (i) a breach of the duty of care, but also (ii) the existence of an actual harm, that is (iii) linked to the aforementioned breach.[67] This burden can prove to be particularly demanding in situations involving GOV practices, thereby complicating the pursuit of legal recourse (eg, in cases where the 'at least your baby is healthy' rhetoric may prevent women from presenting a case, for the actual lack of an

[57] See, among others, Kukura (n 14) 779 ff; Diaz-Tello (n 50) 62 ('the primary tool at the disposal of the US patient for creating change in the health care setting is tort litigation').
[58] Olivia Verity and Camilla Pickles, 'Obstetric Violence: Where Is the Law?' (2022) 34 AIMS Journal 23, 24.
[59] Anne-Isabelle Thuysbaert and Jean-Marc Hausman, 'Vers l'émergence de la problématique des « violences obstétricales et gynécologiques » dans la sphère politique et institutionnelle belge ?' (2023) 37 Journal du Droit de la Santé et de l'Assurance - Maladie 62, 68.
[60] María De Las Mercedes Ales Uría, 'El Daño Por Violencia Obstétrica En La Responsabilidad Civil Como Categoría Diferenciada En La Mala Praxis Médica' <https://www.erreius.com/actualidad/11/familia-sucesiones-y-bioetica/Nota/1290/el-dano-por-violencia-obstetrica-en-la-responsabilidad-civil-como-categoria-diferenciada-en-la-mala-praxis-medica>.
[61] Amélie Pons, 'Violences gynécologiques et obstétricales : vers un éveil des consciences des professionnels de santé ?' (Université de Montpellier 2023) 21–24 <https://dumas.ccsd.cnrs.fr/dumas-04219751>.
[62] Kui Zhang and others, 'Court Decisions on Medical Malpractice in China After the New Tort Liability Law' (2016) 37 American Journal of Forensic Medicine & Pathology 149.
[63] Lauryen Silva Santos Madureira and Taiana Levinne Carneiro Cordeiro, 'Violência Obstétrica: Armadilha de Um Crime Culturalmente Normatizado' (2021) 7 Revista Ibero-Americana de Humanidades, Ciências e Educação 343, 355–357.
[64] Diaz-Tello (n 50) 59 ff.
[65] See Kukura (n 14) 781 who refers to 'inadequate access to representation' as an obstacle women face in bringing a successful tort claim for injuries arising out of GOV practices. Among other factors, see Diaz-Tello (n 50) 59 ff. that mentions statute of limitations or time-barred periods as other obstacles in this field.
[66] Gemma McKenzie, 'Obstetric Violence – What Is It?' (2022) 34 AIMS Journal 8, 10.
[67] Kukura (n 14) 783–790.

harm *stricto sensu*).[68] Also, women might face significant challenges in gathering evidence pertaining to the conditions of their gynaecological and obstetric care, especially when the physician exclusively possesses access to information that could either corroborate or refute the allegations made (eg, hospital guidelines, health authorities' protocols, medical records, etc).

Moreover, the compensatory nature of tort law does little to deter future misconduct, focusing primarily on *ex post facto* remediation.[69] In light of the GOV's magnitude in modern societies, tort law may be perceived as possessing scant utility to tackle GOV practices, falling short in its ability to effectively confront such a 'global phenomenon'.[70] In fact, tort law focuses on compensating for individual harm rather than addressing broader systemic issues or implementing preventative measures.

Lastly, it is worth noting that tort law-related remedies are obviously not tailored to address GOV as a distinct category of GBV, nor are they designed to recognize the status of *victims* for those seeking financial compensation. Instead, women subjected to GOV practices are referred to as *claimants* in those circumstances. This can lead to a judicial process affected by 'epistemic injustice',[71] in that it lacks empathy and understanding for women personal experiences and might thus fail to accurately characterize the conduct of the physicians under examination.[72] As Diaz-Tello evocatively argued, 'the most troubling aspect of leaving the adjudication of obstetric violence to the civil justice system is that it treats the matter as either a medical error or an interpersonal conflict similar to a fistfight on a street corner'.[73]

Disciplinary law, on the other hand, leverages the regulatory authority of professional medical associations to impose sanctions on practitioners who engage in negligent, fraudulent or abusive medical practices. Should a patient claim to have been subjected to unprofessional treatment, contravening the ethical-deontological codes that govern medical practice, a designated administrative procedure is commonly set in motion – the

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[68] Violette Perrotte, Arun Chaudhary and Annekathryn Goodman, '"At Least Your Baby Is Healthy" Obstetric Violence or Disrespect and Abuse in Childbirth Occurrence Worldwide: A Literature Review' (2020) 10 Open Journal of Obstetrics and Gynecology 1544.

[69] Kukura (n 14) 780–781; Verity and Pickles (n 58) 24.

[70] Elizabeth O'Brien and Miriam Rich, 'Obstetric Violence in Historical Perspective' (2022) 399 The Lancet 2183, 2184.

[71] Sylvie Lévesque and Audrey Ferron-Parayre, 'To Use or Not to Use the Term "Obstetric Violence": Commentary on the Article by Swartz and Lappeman' (2021) 27 Violence Against Women 1009, 1014–1015. People are subjected to 'epistemic injustice' where 'they are insufficiently believed or improperly understood because they belong to a non-dominant social group or because the group is affected by certain biases or prejudices'.

[72] See Olivia Verity, 'Utilising Tortious Liability for Unauthorised Vaginal Examinations - Durham University' (*Durham University*, 27 October 2021) <https://www.durham.ac.uk/research/institutes-and-centres/ethics-law-life-sciences/about-us/news/obstetric-violence-blog/utilising-tortious-liability-for-unauthorised-vaginal-examinations/> who emphasise the 'expressive limits of tort law for addressing gender-based harms'.

[73] Diaz-Tello (n 50) 60.

individual concerned has the opportunity to file a complaint before *ad hoc* medical commissions, bodies constituted by medical practitioners themselves.[74] These committees hold the authority to adjudicate the matter and are empowered to distribute sanctions against the implicated healthcare professional. Depending on the gravity of the transgression, the penalties can vary from a mere censure to suspension, or even to the ultimate sanction of irrevocable expulsion from the medical association.[75]

At a first sight, this approach may benefit from a more intimate understanding of medical practices and standards, potentially leading to more nuanced judgments. Indeed, medical practitioners possess the requisite expertise to evaluate a peer's conduct, a nuance often lost on juries or judges who, conversely, may lack the necessary medical know-how. Medical associations generally endorse these adjudicative mechanisms, viewing them as the most appropriate means to harmonize patient welfare with the integrity, honourability and professionalism of the medical fraternity. In instances of GOV, their stance has been notably more assertive,[76] positing that addressing those behaviours within the ambit of disciplinary actions reinforces the perception that such practices are instances of 'malpractice' perpetrated by a minority of outliers, rather than indicative of a systemic flaw pervading the medical profession at large.[77] As GOV practices involve a 'grave breach of trust' between women and medical professionals,[78] it would make sense to make doctors accountable for their unprofessional behaviour before medical committees, in order to assess the compliance of their conducts in light of ethical and deontological standards.

Yet, the effectiveness of disciplinary procedures may be thwarted by potential conflicts of interest within the medical community and a tendency to prioritize the preservation of professional reputations over patient safety. Furthermore, disciplinary actions often

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[74] Charles Vincent, Angela Phillips and Magi Young, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343 The Lancet 1609.

[75] For a comparative perspective, see inter alia Ai-Leng Foong-Reichert and others, 'Characteristics, Predictors and Reasons for Regulatory Body Disciplinary Action in Health Care: A Scoping Review' (2021) 107 Journal of Medical Regulation 17; Martin B Harbitz, Per Steinar Stensland and Birgit Abelsen, 'Medical Malpractice in Norway: Frequency and Distribution of Disciplinary Actions for Medical Doctors 2011–2018' (2021) 21 BMC Health Services Research 324; Berber S Laarman and others, 'How Do Doctors in the Netherlands Perceive the Impact of Disciplinary Procedures and Disclosure of Disciplinary Measures on Their Professional Practice, Health and Career Opportunities? A Questionnaire among Medical Doctors Who Received a Disciplinary Measure' (2019) 9 BMJ Open 1; 'La juridiction ordinale' (*Conseil National de l'Ordre des Médecins*, 25 March 2019) <https://www.conseil-national.medecin.fr/lordre-medecins/linstitution-ordinale/juridiction-ordinale>; 'Compétence disciplinaire' (*Ordre des Médecins de la Belgique*, 2024) <https://ordomedic.be/fr/l-ordre/competence-disciplinaire>.

[76] Frank A Chervenak and others, 'Obstetric Violence Is a Misnomer' [2023] American Journal of Obstetrics and Gynecology 1138, 1142.

[77] On this issue, see Camilla Cannone, 'La violenza in sala parto. Osservazioni a margine di una questione controversa' [2019] Studi sulla questione criminale 151, 155–156; 'Un disegno di legge che offende la professionalità degli operatori sanitari. Contro la malasanità in sala parto non servono nuove leggi' *Gyneco AOGOI* (2016) 14 15.

[78] Jonathan Herring, 'Identifying the Wrong in Obstetric Violence' in Camilla Pickles and Jonathan Herring (eds), *Childbirth, Vulnerability and Law. Exploring Issues of Violence and Control* (Routledge 2019) 74–75.

lack the public visibility necessary to contribute to broader societal deterrence and may be perceived as insular or too lenient.[79] Regarding the specific context of GOV practices, additional elements significantly undermine the efficacy of disciplinary procedures. Firstly, the ethical and medical guidelines governing gynaecological and obstetric treatments have predominantly been crafted by those within the medical community who either dismiss or fail to acknowledge the existence of the GOV phenomenon.[80] To these individuals, who 'possess a monopoly on expertise and their medical authority is rarely questioned',[81] such practices might merely be construed as manifestations of disrespect and abuse or, at most, instances of professional malpractice. As has been aptly observed, 'the health professional … has difficulty identifying himself as the author of [GOV] in its different forms, transposing the practice into natural, justifiable and necessary acts that would be performed for the 'good' of the patients and their babies, thus legitimizing their actions'.[82] Consequently, the foundation upon which disciplinary proceedings are initiated risks being inherently prejudiced from the outset.[83] This inherent bias, akin to the limitations faced by tort law remedies, hampers the ability of disciplinary actions to recognize the unique characteristics of GOV, thereby neglecting its classification as a form of gender-based violence.[84]

4.2 Turning the Tide on GOV—A 'Legal Leap' Towards a Criminalization Process

In contrast, *criminal law* seems to present a more robust framework with the potential to address the multifaceted dimensions of GOV more effectively. Defining certain acts of GOV as criminal offenses – shaping a brand-new criminal offence of GOV – may introduce a significant deterrent through the prospect of penal sanctions, underscoring the societal stigma related to such acts. Criminal law also operates within a more formalized and public arena, offering a platform for societal education about the gravity of GOV and affirming the state's commitment to protecting women's rights and bodily autonomy. As will be seen, criminal law is not without its challenges, including the need for precise legal definitions, the potential for underreporting due to fear of retaliation or mistrust in the legal system and, more importantly, the risks of overcriminalization.[85] Yet, it arguably presents a more comprehensive solution to GOV phenomenon. By incorporating the principles of deterrence, public censure, and the articulation of clear societal norms against GOV, criminal law may offer a more effective means to address and mitigate the perpetration of those conducts.

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[79] Kukura (n 14) 750.

[80] See, eg, Chervenak and others (n 76).

[81] Campbell (n 54) 69.

[82] Danúbia Mariane Barbosa Jardim and Celina Maria Modena, 'Obstetric Violence in the Daily Routine of Care and Its Characteristics' (2018) 26 Revista Latino-Americana de Enfermagem 1, 9.

[83] Cf Boudet-Gizardin (n 55) 14.

[84] Cf Sadler and others (n 2) 50.

[85] See, for a theoretical perspective, Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (1st edn, Oxford University Press 2007).

4.2.1 *Could GOV be criminalised?*

In the realm of criminal law, addressing a particular issue necessitates, as a first step, the precise delineation of the behaviours to be proscribed, thereby facilitating an assessment of their *harmfulness*, *wrongfulness*, and/or their interference with protected *legal interests*, contingent upon the theoretical framework applied.[86] This preliminary stage in the criminalization process is thus dedicated to evaluating the potential for certain actions to be criminalised (ie, penalized by criminal statutes). The principles of 'harm and wrong' and/or 'legal interest' serve to provide preliminary legitimation for any decisions to criminalise.[87] They play a pivotal role in offering *substantive* guidance regarding which behaviours ought to be criminalised – or, alternatively, exempt from criminalization.[88] Concurrently, they delineate the 'penal value' or the 'blameworthiness' associated with a specific action, in line with the widely recognized definition provided by Jareborg.[89]

Against this background, it is noteworthy that, despite being broadly categorized under the umbrella term that includes 'abuse', 'coercion', and 'disrespect' conducts, there is, prima facie, a compelling argument for the criminalization of all behaviours associated with GOV practices.

Primarily, these activities are inherently *harmful* and *wrongful*, making it challenging to dispute their adverse effects on the affected women.[90] The 'harm principle', a cornerstone of the Anglo-American legal systems, legitimates the criminalization of wrongful actions that result in the detriment to another's interests.[91] Referring to some GOV practices, the implementation of a C-section without a woman's consent or absent a medical necessity constitutes harmful conduct to the woman's bodily autonomy, as do acts of coercion aimed at securing consent under duress. For instance, in China, physicians who practice

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[86] See, on this topic, Nina Peršak, 'Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU' (2022) 33 Criminal Law Forum 85, 106–108 and 110 ff.; Jannemieke W Ouwerkerk, 'Old Wine in a New Bottle: Shaping the Foundations of EU Criminal Law through the Concept of Legal Interests (*Rechtsgüter*)' (2021) 27 European Law Journal 426; Jacob Öberg, 'Normative Justifications of EU Criminal Law: European Public Goods and Transnational Interests' (2021) 27 European Law Journal 408; Nina Peršak, 'Principles of EU Criminalisation and Their Varied Normative Strength: Harm and Effectiveness' (2021) 27 European Law Journal 463; Silva Santos Madureira and Cordeiro (n 63) 357 ff.

[87] See, among others, Sanne S Buisman, 'The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level' (2022) 30 European Journal of Crime, Criminal Law and Criminal Justice 161, 165–172 and further doctrinal and case-law references cited therein.

[88] Nina Peršak, 'EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation' (2018) 26 European Journal of Crime, Criminal Law and Criminal Justice 20, 23.

[89] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 Ohio State Journal of Criminal Law 521, 527.

[90] See Boudet-Gizardin (n 55) who aptly noticed that 'la spécificité des actes gynécologiques et obstétricaux rend parfois difficile la qualification pénale de ces infractions ... les examens gynécologiques et obstétricaux comprennent intrinsèquement une atteinte à l'intégrité physique ou sexuelle'.

[91] See, among others, Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17 Legal Theory 35; Robin Antony Duff, 'Harms and Wrongs' (2001) 5 Buffalo Criminal Law Review 13.

C-sections may be prosecuted for illegal exercise of the medical protection.[92] In Belgium, doctors could be convicted of torture for performing a suture after an episiotomy without anaesthesia.[93] This might strengthen the standpoint that criminalisation of those conducts would not be inappropriate.[94]

Offenses that directly or indirectly impair a woman's bodily integrity, such as 'abuse' or 'coercion' ones, are particularly susceptible to being characterized as harmful, given their impact not only on the psychological but also on the physical well-being of women.[95] Furthermore, these actions may be deemed wrongful in that they involve gynaecological and obstetrical practices conducted without patient consent and lacking medical justification and in the context of 'coercive control' imposed by the healthcare professional.[96]

Even acts of 'disrespect' and humiliation directed at women in labour – including offensive remarks about a patient's sexual history or pre-existing medical conditions – can be deemed harmful and wrongful, albeit perhaps to a lesser degree, especially considering the context of extreme vulnerability in which the woman finds herself.[97] In any case, the common recognition of GOV practices as a manifestation of GBV[98] and, as such, a violation of human rights at the Inter-American,[99] European[100] and international level,[101] along with its characterisation as a global health problem, consolidates the argument that such practices are inherently harmful and wrongful. This recognition extends not solely towards the women directly impacted but also towards society at large, suggesting the necessity for perpetrators to be subject to criminal sanctions.[102]

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[92] Xin Chen, 'Panorama de la violence obstétricale en Chine : facteurs et solutions' (2023) 37 Journal du Droit de la Santé et de l'Assurance - Maladie (JDSAM) 75, 80.

[93] Thuysbaert and Hausman (n 59) 67.

[94] Brennan (n 2) 246.

[95] Paricard (n 55).

[96] Herring (n 78) 71–74.

[97] Boudet-Gizardin (n 55) 13.

[98] Cf Sara De Vido, 'The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35' [2018] Diritti umani e diritto internazionale 379 who argues that the notion of 'violence against women' encompasses several crimes that 'disproportionately affect women and/or they are committed against women because they are women'.

[99] *Britez Arce and others v Argentina* (n 38) para 75 ff.

[100] 'Obstetrical and Gynaecological Violence' (n 23).

[101] Šimonović (n 8); 'Joint Statement by UN Human Rights Experts*, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights' (*OHCHR*, 24 September 2015) <https://www.ohchr.org/en/statements/2015/09/joint-statement-un-human-rights-experts-rapporteur-rights-women-inter-american>.

[102] This consensus amplifies the need for a legal response that transcends individual harm, addressing the broader societal and ethical implications of GOV practices, thereby affirming the imperative for criminal accountability in tackle these human rights violations.

Indeed, the premise that specific behaviours are harmful and wrongful is predicated on the notion that there are certain *interests* injured by these actions.[103] These interests, termed as *Rechtsgüter* ('legal goods') in German legal doctrine, embody fundamental societal values deemed so essential that the deployment of criminal law – the State's most intrusive instrument of enforcement – is justified to safeguard them.[104]

Considering GOV practices, it is evident that such actions infringe upon the *bodily and psychological integrity* of the women involved, legal interests that are safeguarded under existing criminal law provisions (eg, harassment, sexual violence, aggression). What is more, the behaviours – categorized under 'abuse', 'coercion', and 'disrespect' categories – not only harm the aforementioned legal interests but, as highlighted in doctrinal and political circles, can also profoundly impact the *dignity* of the affected woman.[105] This includes encroachments on her personal freedom (for instance, when she is compelled to give birth in a specific position), her sexual and reproductive identity or integrity (exemplified by exposure to sexist remarks or sexualized conduct), and, more expansively, her right to self-determination.[106]

In conclusion, all conducts of GOV appear prima facie to be harmful and wrongful in that they negatively affect legal interests that deserve criminal law protection. However, this aspect is a necessary, yet not sufficient, step to criminalise certain behaviours. Where this first ground has been satisfied – ie, that GOV practices *could* be criminalised – it rests to determine whether GOV *should* be criminalised.

4.2.2 Should GOV be criminalised?

Several arguments may be briefly developed to suggest that some (thus, not all) GOV practices ought to be punished by means of criminal law.

Foremost among these is the doctrine of *ultima ratio*, or 'necessity test'.[107] This principle asserts that criminal law should be a measure of last resort, employed only when other measures have proved inadequate.[108] Given the lack of impact of tort and disciplinary

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[103] Massimo Donini, 'Il principio di offensività. Dalla penalistica italiana ai programmi europei' [2013] Diritto Penale Contemporaneo - Rivista Trimestrale 4.

[104] Benjamin Vogel, 'Zur Bedeutung Des Rechtsguts Für Das Gebot Strafgesetzlicher Bestimmtheit' (2016) 128 Zeitschrift für die gesamte Strafrechtswissenschaft 139.

[105] See Ferrão and others (n 2) 1090 and the references cited therein; Fernando Aith, Marina Borba and Matheus Falcão, 'La dimension juridique de la violence obstétricale au Brésil' (2023) 37 Journal du Droit de la Santé et de l'Assurance - Maladie 50.

[106] Silva Santos Madureira and Cordeiro (n 63) 357–362; Rebecca Reingold and Isabel Barbosa, 'Rethinking Obstetric Violence: Is Criminalization Really the Only Way Forward?' (*O'Neill Institute for National & Global Health Law*, 11 April 2008) <https://oneill.law.georgetown.edu/rethinking-obstetric-violence-is-criminalization-really-the-only-way-forward/>.

[107] Jareborg (n 89).

[108] See, on this topic, Peršak, 'EU Criminal Law and Its Legitimation' (n 88) 27 ff.

law *vis-à-vis* GOV practices, criminalization of the latter may be justified – rather, legitimized[109] – by the failure of these alternative approaches, depicting the essentiality of criminal law as the only remaining solution at the domestic level to tackle on this issue.

Secondly, the question of *proportionality* in using criminal law also arises.[110] It embodies an analysis on whether criminal law might be the most *appropriate* tool to address a certain issue, ie, whether it contributes to achieve the pursued aim.[111] While not all actions warrant criminalization, it is equally true that, as aptly observed by Duff, 'not all expansion of the criminal law constitutes overcriminalization'.[112] For the sake of coherence and appropriateness, the creation of a brand-new criminal offence should consider *inter alia* whether the conduct at hand is already covered by existing (criminal) legislation.[113] If so, the legislator should refrain from creating a novel criminal offence, unless this proves to be more effective in protecting a legal interest than the *status quo*.[114] As for GOV practices this standard also applies – certain acts of 'disrespect' might arguably be already penalized, such as 'hate speech' in cases of sexist remarks or insults, which are founded on gender-based hatred.[115] Conversely, proscribing acts of 'abuse' and 'coercion', albeit already punished as different offences (eg, assault), aligns with the intended objective of terminating GOV practices by medical professionals, thus protecting *more effectively* the aforementioned legal interests affected by those behaviours.

Thirdly, international responsibilities further tilt the scale towards criminalization. The UN Special Rapporteur on violence against women has articulated that States have an obligation to respect, protect, and fulfil women's human rights during reproductive services and childbirth, which includes enacting laws and policies to combat and prevent GBV, 'prosecute' perpetrators, and 'provide reparations and compensation to victims'.[116] The same obligations of 'preventing', 'prohibiting' and 'punishing' GOV practices have been highlighted by international and regional human rights experts in 2015.[117] Reference to prosecution and punishment strengthens the stance that criminalization obligations

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[109] Alessandro Corda, 'Legittimazione del diritto penale e crisi "performative" della penalità' in Carlo Piergallini and others (eds), *Studi in onore di Carlo Enrico Paliero*, vol 1 (Giuffrè Francis Levebvre 2022) 25 ff.

[110] See, with further references, Francesco Viganò, 'Diritto penale e diritti della persona' in Carlo Piergallini and others (eds), *Studi in onore di Carlo Enrico Paliero*, vol 2 (Giuffrè Francis Levebvre 2022) 845 ff.; Nicola Lacey, 'Getting Proportionality in Perspective: Philosophy, History, and Institutions' (2021) 50 Crime and Justice 77, 77 ff.; Victor Tadros, *The Ends of Harm. The Moral Foundations of Criminal Law* (Oxford University Press 2011) 331 ff.; Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" To "How Much?"' (1990) 1 Criminal Law Forum 259, 259 ff.

[111] Buisman (n 87) 172 ff.

[112] Robin Antony Duff, 'A Criminal Law for Citizens' (2010) 14 Theoretical Criminology 293, 295.

[113] Buisman (n 87) 181.

[114] In certain instances, existing criminal charges may not accurately reflect the nature of the conduct at hand, as when acts of bodily harm inflicted by a police officer during duty – a conduct which is almost always already criminalised – should be more aptly categorized as 'torture' rather than simple 'assault'.

[115] Cf Peršak, 'Criminalising Hate Crime and Hate Speech at EU Level' (n 86).

[116] This is the wording adopted by Šimonović (n 8) para 75.

[117] Joint Statement (n 101).

are burdening States in this field. At the Inter-American level, things are even clearer – the IACtHR has emphasised that 'women have the right to live a life free of obstetric violence and the States have the obligation to *prevent*, *punish* and abstain from practicing it',[118] recalling, on the one hand, that GOV is a form of GBV[119] and, on the other hand, the necessity to criminalise GOV practices as per the Follow-Up Mechanism to the Convention of Belém do Pará.[120] At the European level, a Resolution from the Parliamentary Assembly of the Council of Europe urged State Parties to draw up 'legal provisions *penalising* [GOV]'.[121] Similarly, the European Economic and Social Committee shared the view that GOV conducts should be combated, by means of criminal law, as a form of violence against women.[122]

Fourthly, the rationale behind specific criminal policy for GOV is multifaceted. The absence of a specific criminal statute addressing GOV could lead to state international liability due to a lack of protection for the victims of those conducts, whose grievances might remain unaddressed under current legal frameworks. Besides, without a distinct criminal category for GOV, its societal disvalue remains unrecognized by law enforcement, healthcare personnel, and the judiciary. This lack of legal recognition – involving, in turn, the absence of a specific definition to term this widespread phenomenon – hinders the effective suppression of GOV.[123]

5 Concluding remarks

In conclusion, tackling on GOV practices within the criminal legal framework presents a complex but necessary challenge.

While criminalization of *certain* GOV practices is essential, it is crucial to ensure that *solely those serious behaviours falling under the categories of 'abuse' and 'coercion' may be targeted*. Such legislative actions should adhere steadfastly to the principles of legality, ensuring clarity and predictability in defining criminal offenses, and proportionality, to align penalties appropriately with the severity of the offenses. For instance, while the criminalization of compelled lactation may present conceptual challenges, the penalization of unnecessary or unconsented vaginal inspections, falling under the 'abuse' category, appears more justifiable. The delineation of such legal boundaries must cautiously take into

[118] *Brítez Arce and others v Argentina* (n 38) para 77, emphasis added.
[119] Ibid 75.
[120] Ibid 80.
[121] See the Explanatory Memorandum in 'Obstetrical and Gynaecological Violence' (Parliamentary Assembly of the Council of Europe 2019) Report No. 14965 para 70 <https://pace.coe.int/en/files/28108/html>, emphasis added, which refers to the Resolution entitled 'Obstetrical and Gynaecological Violence' (n 23).
[122] 'Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Combating Violence against Women and Domestic Violence' (European Economic and Social Committee 2022) 2022/01395 para 3.31 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022AE1395>.
[123] Pickles (n 2) 634 ff.

account fundamental criminal law principles, including the assessment of harm, the protection of legal interests, and the principle of last resort. It will be for the legislator to precisely identify those serious behaviours of GOV that deserve criminalization.

However, in our understanding, the panacea to GOV cannot be found *solely* within the realms of criminal law. Relying on criminal penalties, in isolation, proves insufficient, albeit the cautious criminalization-based approach fostered in this paper is (also) based on the limited efficacy of tort and disciplinary law in this domain. As a result, we believe that the cornerstone of a more holistic solution lies in the implementation of training and awareness-raising initiatives targeted at medical professionals and women respectively, in order to make the former conscious of their duties and make the latter conscious of their reproductive rights. Such gender-sensitive educational programmes are pivotal, operating in tandem with legal measures to address the underlying causes and entrenched societal attitudes that facilitate GOV.

After all, a paradigm shift in cultural norms and attitudes is indispensable in the fight against GOV practices. A careful and initial legal intervention, criminalizing certain GOV conducts, could act as a catalyst for broader societal change, not only deterring specific actions but also helping to eradicate the deeper cultural norms and practices that perpetuate GOV. This combined approach of legal reform, educational initiatives, and cultural change may be essential for effectively addressing and ultimately eliminating GOV.

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