

Infidelity as immoral social conduct v. custodial rights

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In Azerbaijan, a 2020 European Court of Human Rights decision overturning a rare child custody ruling has renewed interest over how moral reasonings for legal judgements on adultery should impact whether or not a parent can live with their children. Laman Babayeva lost custody of her children after accusations of adultery in a 2011 Azerbaijani divorce case. Both parents sought maintenance for their two children, aged 3 and 8 at the time, but the District Court of Ganja awarded custody to the father. Despite expert opinions confirming that both parents' homes were suitable, the court cited moral concerns about Ms. Babayeva's alleged affair and its potential impact on the children, ruling her actions incompatible with raising them. Even after the applicant appealed, arguing that the first-instance court had ignored expert opinions and violated her right to privacy, both the Court of Appeal and the Supreme Court upheld the ruling, emphasizing her moral conduct and the father's stable living conditions. Although she eventually regained her rights through the European Court of Human Rights after years of legal struggle, the case reveals a troubling reality of the Azerbaijani justice system. The system often acts as an arbiter of public morality rather than upholding the rule of law. This raises important questions about how societal values influence court decisions in custody cases.

Therefore, the focus of this analysis will be how societal perceptions of parental infidelity shape custody outcomes. Through a discussion of the *Babayeva* case, I will argue that courts should function strictly as legal institutions and therefore should not impose social norms or punish people for alleged immoral behavior. Instead, the courts should focus on the best interests of the child and only evaluate the morality

of a parent when it directly affects the child's upbringing. I will then explore the possibility of incorporating the principles of *no harm* and *care* into the best interest standard as a clearer, more child-centered framework for effectively resolving custody disputes.

Custody laws: focus on the child's best interests

Azerbaijani law places the best interests of the child at the core of all custody decisions. The Family Code and the Law on the Rights of the Child require that parental rights be consistent with the well-being of the child, ensuring his or her physical, mental and moral development.^[i] When resolving disputes, courts consider factors such as the child's attachment to each parent, their age and developmental needs.^[ii] Although mothers are generally granted custody, exceptions apply when they are unable to provide adequate care due to circumstances such as illness or neglect.^[iii]

This child-centered approach is in line with Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life.^[iv] According to this article, national authorities must balance the interests of the child and the parents, giving priority to the child's well-being where necessary.^[v] Domestic courts must avoid measures that may harm the child's health or development and conduct a comprehensive examination of the family situation.^[vi] This includes assessing emotional, psychological, material and medical factors to ensure that decisions are balanced,^[vii] reasonable and ultimately in the best interests of the child.^[viii]

The *Babayeva* case: morality versus law

As noted above, in the *Babayeva* case a mother lost custody of her children. The precise reason for such judgement was that

the Azerbaijani courts considered her alleged extramarital affair to be incompatible with moral standards and therefore harmful to the upbringing of the children in a morally healthy environment. Relying on Article 60.4 of the Family Code, which puts the child's best interests first, the courts based their decision on the applicant's alleged immorality as a decisive factor, despite expert opinions that confirmed that both parents' homes were suitable for raising the children. Higher courts, including the Supreme Court of the Republic of Azerbaijan, upheld the decision to deprive her of parental rights. In contrast, in examining the applicant's application, the European Court of Human Rights found that the domestic courts had failed to adequately establish the best interests of the child. In this regard, the domestic courts' reference to moral principles was not in accordance with the law. The European Court of Human Rights subsequently concluded that this constituted a violation of the applicant's rights under Article 8 of the European Convention.^[ix]

I recognize that growing up in an environment where infidelity occurs may negatively influence children. It could foster trust issues or normalize deceptive behaviors, potentially conflicting with values such as loyalty and integrity, which may harm the child's future interpersonal relationships. It also might not. This analysis does not explore the broader implications of infidelity on family dynamics or personal values. Instead, I focus on whether the alleged immorality of one parent, whether mother or father, should have influenced the domestic court's decision to award custody to the other parent.

Despite the lack of research in Azerbaijan on morality in custody disputes, existing studies show that family law has avoided direct discussions of morality in recent decades. Some commentators advocate for introducing morality into such cases from a religious perspective, but critics correctly argue that morality in legal contexts may often be narrowly framed as

regulating sexual behavior or addressing personal failings.^[x] Given that law is no longer viewed as a direct guide to moral conduct, the primary role of courts should be to administer legal justice by applying established laws. Their responsibility is to ensure fairness and focus on the best interests of the child, rather than on moral judgments.

In custody cases, the Azerbaijani Family Code emphasizes the best interests of the child and identifies various factors to consider, such as the child's attachment to parents and siblings and the conditions for proper upbringing. The same standard is stated in Article 5 of the Law on the Rights of the Child, which mandates that all governmental bodies, physical persons, and legal entities must prioritize children's interests and create conditions to ensure the protection of their rights. The lack of a clear explanation of what these interests are in legislation allows for subjective interpretations, which can lead to decisions that are influenced by broader legal or policy considerations.^[xi]

In the *Babayeva* case, while the national courts considered the moral and personal qualities of the parent, these should have been weighed solely in the context of determining the child's best interests and not as an independent or decisive factor. This, in turn, raises an essential question: What is the best interest of the child?

The child's best interest standard

Interestingly, in the 19th century, children were initially treated as property in custody cases. Over time, judicial systems have shifted to a child-centered approach, prioritizing the child's best interests over parental authority. The best interests standard may include various factors, such as prioritizing biological parents, recognizing primary caregivers, supporting joint custody, ensuring substantial parental involvement, maintaining residential stability, and disfavoring custody for perpetrators of

domestic violence.^{[\[xii\]](#)}

Despite the availability of these multifaceted factors, a lack of precise statutory definitions, as noted above, often complicates custody decisions and contributes to inconsistencies in outcomes. Judges have substantial discretion in evaluating factors such as credibility and parental behavior. While this flexibility allows courts to address unique circumstances, it can also introduce subjectivity and variability in outcomes. This reliance on personal subjective judgment often undermines efforts to establish a universally coherent application of the standard, reducing its effectiveness in achieving fair and consistent custody decisions.^{[\[xiii\]](#)}

While the best interest is and should remain the cornerstone of custody determinations, its inherent vagueness can be mitigated by integrating complementary principles like *no harm* and *care*. The no-harm principle in custody disputes asserts that parental behavior, such as infidelity should influence custody decisions only if it demonstrably harms the child. Operating as a negative rule within the framework of the child's best interests, this principle prioritizes evidence-based assessments over subjective moral judgments.

Under this approach, courts must establish a clear and direct connection between a parent's infidelity and actual harm to the child. Generalized assumptions about a parent's immorality, as seen in the *Babayeva* case, are insufficient. The potential harm caused by parental infidelity may depend on several factors, including the discretion or public nature of the parent's actions, the frequency and intensity of the infidelities, whether the behavior became obsessive to the extent of neglecting the child, if the child directly witnessed the infidelity.

The argument that harm may have a *sleeper effect* suggests that the long-term psychological consequences of parental

infidelity may not immediately manifest but can significantly influence a child's emotional well-being as they mature.^[xiv] It is hard to dispute that psychological harm, unlike physical damage, often remains invisible in the short term, making it more challenging to detect. This underscores the importance of incorporating psychological evaluations into custody proceedings to apply the no-harm principle effectively. By doing so, courts can ensure decisions align with the child's best interests, considering both visible and latent effects on their emotional and psychological development.

Complementing the no-harm principle, the principle of care is equally important in custody decisions, particularly when assessing the best interests of the child. While morality often dominates discussions in such disputes, it is crucial to highlight that care, defined as nurturing and attentive behavior, plays an equally significant role.^[xv] Morality and values in this context should extend beyond matters like infidelity. Importantly, the principle of care transcends instinctual affection or natural love. It embodies a moral practice requiring active and thoughtful engagement with a child's emotional, physical, and developmental needs.

By recognizing care as an integral component of custody decisions, courts can ensure a more comprehensive approach that prioritizes the child's overall welfare and development. Together, the frameworks of *no harm* and *care* make the *best interests standard* into a more precise and child-focused tool for decision-making. These complementary principles work to reduce harm while promoting nurturing environments, fostering a robust and complete approach to custody determinations.

Finally, to answer the main question posed at the outset: A parent's infidelity may affect the outcome of a child's custody, but decisions taken solely on this basis, without a thorough assessment of the key factors, are unlawful. Such a consideration would violate the parent's right to family life

under Article 8 of the European Convention on Human Rights. Therefore, the alleged infidelity should be considered only as one factor among many, weighed against other important considerations such as the potential harm involved and, of course, the principle of care in considering the child's best interests. This holistic approach ensures that custody decisions remain fair, evidence-based, and centered on the child's overall welfare.

Notes and References

[i] Family Code of the Azerbaijan Republic (1999) No 781-IQ, as amended on 25 June 2024 accessed at <https://cis-legislation.com>.

[ii] Law of the Republic of Azerbaijan on the Rights of the Child (1998) No 3292, accessed at <https://e-qanun.az/framework/3292>.

[iii] The State Committee for Family Women and Children Affairs of the Republic of Azerbaijan accessed at <https://family.gov.az/en/faqs?page=1>.

[iv] European Convention on Human Rights (ECHR), Article 8 (1950) accessed at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[v] David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018).

[vi] *Olsson v. Sweden (No. 1)* App no [10465/83](#) (ECtHR, 24 March 1988) accessed at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57548%22%5D%7D>.

[vii] *Sommerfeld v. Germany* App no [31871/96](#) (ECtHR, 8 July 2003) accessed at

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-61195%22%5D%7D>.

[viii] *Širvinkas v. Lithuania* App no21243/17 (ECtHR, 23 July 2019) accessed at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-194735%22%5D%7D>.

[ix] *Babayeva v Azerbaijan*, App no 71750/13 (ECtHR, 02 June 2022) accessed at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-217747%22%5D%7D>.

[x] Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 *Journal of Law and Society* 485.

[xi] Joanne Ross Wilder, 'Religion and Best Interests in Custody Cases' (2002) 18 *Journal Name* 211; Unicef, *Analysis of the Legislation of Azerbaijan in Respect of Access to Justice for Children* (UNICEF 2014) <https://www.unicef.org/azerbaijan/media/806/file/Azerbaijan%20Legal%20Review%20on%20Justice%20for%20Children-ENG.pdf>.

[xii] Joanne Ross Wilder, 'Religion and Best Interests in Custody Cases' (2002) 18 *Journal Name* 211.

[xiii] Ibid.

[xiv] Lynn D Wardle, 'Parental Infidelity and the "No-Harm" Rule in Custody Litigation' (2002) 52 *Catholic University Law Review* 81

[xv] Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 *Journal of Law and Society* 485.