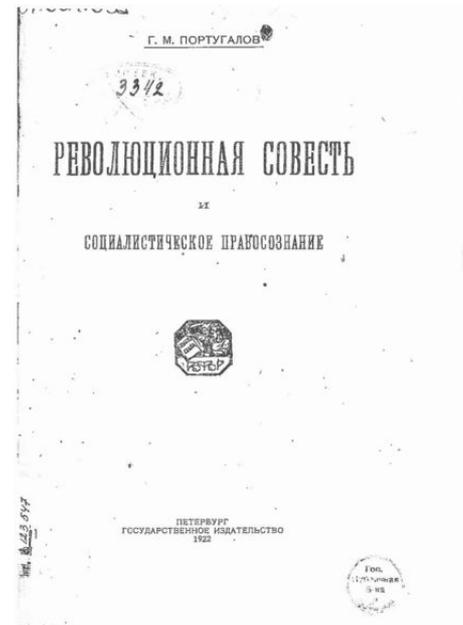


Revolutionary Conscience, Emotions and the Administration of Justice in the Early Soviet Period

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How can a legal treatise serve as a useful source for a historian of emotions? Aren't legal treatises one of the most formalized types of texts, bound by the numerous conventions and restrictions of both legal jargon and academic writing? Although at first glance these assumptions might seem intuitive, they are not necessarily true, and are certainly not applicable to documents produced during the years immediately following the Russian Revolution, an era of social and political change and revolutionary upheaval that also witnessed one of the most radical legal reforms in the history of humankind. In revolutionary times the generic conventions that shape historical documents in general and legal documents in particular are also in a state of flux. Researching these shifts in convention provides a unique perspective for tracing and analyzing the construction of new social and professional norms. To take one example, Grigorii M. Portugalov's short book, *Revoliutsionnaia sovest' i sotsialisticheskoe pravosoznanie* [Revolutionary Conscience and Socialist Legal Consciousness], published in Petrograd in 1922,[1] clearly appealed to the emotions of the judge by emphasizing the importance of conscience and 'inner feeling' in the administration of justice, thus deviating from the traditional view that held rationality to be the key element in judicial decision-making.[2] Portugalov's book was one of the first specialist treatises to approach the significance of conscience for jurisprudence and was thus widely discussed in Soviet legal circles throughout the 1920s.[3] This essay seeks to explore the meanings and roles that early Soviet scholars attributed to conscience and emotions in legal judgment. While focusing on Portugalov's treatise, it also draws on examples from early Soviet legal practice as well as other academic publications by legal scholars of the period.



In the following, I define "conscience" as the psychological aspect of moral judgment, and claim that it has a strong emotional component. This understanding of conscience finds confirmation in the often used Russian expression *chuvstvo sovesti* (literally, "the feeling of conscience").[4] For early Soviet legal scholars like Portugalov, conscience was irreducible to purely rational self-control, and was thus unimaginable without an emotional dimension. But the nature of these emotions was not always clearly defined. Following Portugalov, who did not differentiate between particular emotions in legal judgment (one might speculate that relevant emotions might include empathy, compassion or solidarity – but also disgust or anger), I use generalized categories such as "emotion" or "feeling" throughout this text.

The Russian Revolution of 1917 was transformative in many respects, not least for the Russian legal system. Significantly, it created a new, *revolutionary*, type of law – a concept which is much understudied yet critically important for our understanding of the relationship between law and emotions in societies in states of transition. In Portugalov's opinion, early Soviet law was "totally isolated in the system of world laws". It thus gave scholars a unique opportunity to study law-making and legal consciousness in a quasi-experimental setting.[5]

A singular feature of the early Soviet period that is relevant for the history of law and emotions is the concept of "revolutionary justice", which was promoted by high-profile Soviet politicians and the decrees of the Council of People's Commissars (Soviet government). The idea is that judges should be guided by their revolutionary *feeling of justice*, and should not be confined by formal "bourgeois law". In fact, after the revolution, all pre-revolutionary laws were abolished, and there was no penal code in Soviet Russia until June 1922.[6] Vadim I. Musaev notes that the absence of clear judicial norms in that period meant that in practice, "the authorities based their decisions on their own understanding of what can and cannot be tolerated in the new society".[7] Since the decrees of the Soviet government provided only brief and vague guidelines on the nature of the new legal system, law enforcement and judges had to cope with the difficult task of applying schematic classifications of crimes to real life crimes on an everyday basis. Needless to say, there were significant variations between individual courts. The early Soviet legal experiment was thus unprecedented in that it combined strict ideological control and political repression with blurry, constantly shifting legal definitions, giving almost unlimited freedom to the local courts.

The role of emotions in the administration of justice is a major issue in the literature on law and emotions[8] – and yet, historians have left the topic largely unexplored. The "emotional" view of justice that defined early Soviet law differed from most conventional legal systems based on rational procedure. The very first decree "On Courts", issued in November 1917, proclaimed that local courts should consider the laws of the "overthrown governments" only to the extent that they do not conflict with "revolutionary conscience" (*sovest'*) and "revolutionary legal consciousness" (*pravosoznanie*).[9] Soviet legal scholars later stressed the

importance of "revolutionary consciousness" (*soznanie*) and "revolutionary feeling" (*chuvstvo*) for the administration of law in the immediate aftermath of the Revolution of 1917.[10]

In his essay, Portugalov primarily engaged with these two key concepts of early Soviet law: "revolutionary conscience" and "socialist legal consciousness". In the opening section, he explored the history of conscience and its relevance for judicial decision-making by tracing its evolution out of the Roman idea of "good conscience" (*bona fides*), providing socio-economic (Marxist) explanations for shifts across stages of history, "social formations", and modes of production. In particular, Portugalov noted the odious legacy of the medieval idea of conscience in the legal context: in his view, the "good conscience" of the inquisitors was closely linked to witch trials, torture, arbitrariness, and fanatic religiosity that were obviously undesirable in early Soviet Russia.[11]

According to the Marxist view of history, shifts in the dominant "social formation" necessarily produce changes in both human subjectivity and the law. Thus, the new, "socialist" feeling of conscience was seen by early Soviet scholars as being fundamentally different from its ancient Roman, medieval, and capitalist predecessors. In the new socio-economic context after the revolution, conscience was supposed to be "invented" anew, to be freed of all undesirable traits, and thus shaped to reflect the "correct" worldview, values, and affective dispositions of the victorious working class. Crucially, this new feeling was also supposed to operate differently in the legal context: "having been freed from the old standards of good and evil", revolutionary conscience could "react immediately to the various manifestations of the human will [and] bring it under control of the emerging legal order ... that is being created by the revolutionary will of the people".[12] Importantly, Portugalov explicitly connected this view of revolutionary conscience to Lev Petrazhitskii's "psychological" or "intuitive" legal theory, which was developed in the late Imperial period but which remained marginal until 1917. In particular, he related it to Petrazhitskii's view that law was essentially an emotion, similar to anger, felt towards a "morally reprehensible deed".[13]

In the aftermath of the revolution, the new, revolutionary law was indeed created through the improvisation of the masses, who were given significant freedom to administer justice and render sentences in the "people's courts".[14] People's Commissar for Enlightenment, Anatoly Lunacharsky, enthusiastically greeted this creative atmosphere in the courtroom, which he described as "boiling, fermenting young wine".[15] In his own analysis of this experimental legal system, however, Portugalov sought to draw distinctions between "revolutionary conscience" and "socialist legal consciousness". On the one hand, he saw conscience as an emotion experienced individually, while viewing legal consciousness as a shared, social feeling.[16] On the other hand, as was mentioned above, conscience had a history that tied it to feudalism and capitalism, while legal consciousness was perceived as being explicitly socialist and even "purifying".[17] Important to note is that as a collective feeling, it was also linked closer to the Bolshevik political project and had significant ideological connotations. Moreover, the requirements Portugalov gives for judges associated the concept with the more educated and experienced party members.[18]

In a sense, "revolutionary conscience" was an important emotional element in the tripartite structure of "revolutionary legal consciousness" described by Portugalov. First, the judge had to thoroughly examine all the circumstances of the cases (in this respect, Portugalov did not discourage judges from relying on rationality, logic, and expert scientific knowledge).[19] Then, the court had to conform to the decrees of the Soviet government (thus affirming its political loyalty). But the most important element was the "inner conviction" of the socialist court – its "revolutionary conscience". In particular, it had to be used in the final stages of the trial and during sentencing.[20] In Portugalov's words, the act of meting out a punishment should be *entirely* based on the "inner feeling" (*dushevnoe chut'e*) of the judge.[21] In making this claim, Portugalov and other early Soviet jurists placed a very strong emphasis on emotion in legal judgment and argued that judges should enjoy a high degree of autonomy.

Also important is the fact that Portugalov perceived the evolution of early Soviet law as a move from a more restricted "revolutionary conscience" to a more overarching concept of "socialist legal consciousness". This view was reflected in government decrees that began prioritizing the latter term in the early 1920s. Writing in the year when the first Soviet Penal Code was put into force, Portugalov enthusiastically viewed codification as a kind of "crystallization" and as a way of returning "socialist legal consciousness" back to the masses.[22] On the surface, the return of the Penal Code seemingly contradicted the Marxist-Leninist principle of the withering away of the state and the law.[23] However, Portugalov did not seem to perceive it as a problem, and firmly asserted that there was an almost transcendental unity of the codified law and "socialist legal consciousness". For him, this unity was a phenomenon of mass psychology, reflective of how the collective mind of the working class had acquired "scientific-socialist" laws of social development.[24]

This unity of codified law and legal consciousness had to be partly achieved by means of legal reform, which sought to appoint the judges primarily on the basis of their class origin and not their professional qualifications. At least in theory, most judges were not supposed to have any professional training, and the appointment of "bourgeois" judges with university degrees was discouraged. Portugalov noted that "the trial of the workers by the workers gives the best guarantee of mutual understanding in regard to the conditions of the everyday life, worldview, [and] customs".[25] However, judicial practice proved to be much more complicated, and the new state had to rely on the old legal specialists for a long time. This problem was even explicitly acknowledged by early Soviet legal scholars and practitioners.[26]

While the ongoing "normalization" of everyday life in the 1920s and the gradual codification of the law were meant to achieve a "solid foundation of the revolutionary legal order",[27] they also led many to experience

nostalgia for the romantic and chaotic times of the Civil War, "war communism", and "revolutionary justice".[28] Indeed, one should not simply view codification as an inevitable stage in the chronological development of Soviet law (or any post-revolutionary law, for that matter). Expressing an alternative point of view, legal scholar Il'ia Slavin asserted in his commentary on the adoption of the first Soviet Penal Code in 1922 that "the revolution has not been relegated to the archives, and revolutionary legal consciousness should stand out in every verdict: it is restricted by the written norms, but it is not abolished".[29] By the late 1920s, however, this "romantic" opinion was being increasingly rejected by both the members of the party apparatus and by mainstream legal scholars. In the long term, the principle of codification was fundamentally in conflict with the logic of the *feeling of justice* model.

Throughout modern Russian history, the relationship between living by law (*po zakonu*) and living by justice (*po spravedlivosti*) has been hotly debated, with some scholars suggesting that the two are not complementary (like in conventional conceptualizations of the rule of law / *Rechtsstaat*), but contradictory.[30] Early Soviet legal experiments presented an ambitious (and in some ways successful) attempt to overcome this distinction by both substituting professional "bourgeois judges" with the "ordinary people" as well as by prioritizing emotional and impromptu judge-made law over the cold rationality of the Penal Code and the state.

Analysis of early Soviet law shows, however, that there were also substantial discrepancies between the writings of legal scholars and the actual implementation of the new legal model. While the role of emotions in jurisprudence was quickly legitimized over the course of a few months of revolutionary upheaval, they did not necessarily fall in line with the state's political/ideological prescriptions, which led to the return of the primacy of codified law. As this analysis of Portugalov's 1922 treatise has shown, after the revolutionary euphoria had calmed down in the early 1920s, jurists came to hold the view that the feeling of conscience and related emotions were undesirable in the legal context and that they should be harnessed and replaced by more overarching legal concepts that were perceived as being easier to control. While this move was skillfully disguised as a 'return' of socialist legal consciousness back to the masses, it ultimately allowed for the control of the party bureaucrats over the court system and the emergence of Stalin's repressive machine in the 1930s.

[1] Grigorii M. Portugalov, *Revoliutsionnaia sovest' i sotsialisticheskoe pravosoznanie* [Revolutionary Conscience and Socialist Legal Consciousness] (Petrograd: Gosizdat, 1922).

[2] Modern Russian and Soviet definitions of emotion (including the use of the term in the legal setting) mostly followed the juxtaposition of *emotio* and *ratio*, as is well-documented for many Western cultural contexts.

[3] Ol'ga D. Maksimova, "Revoliutsionnoe pravosoznanie kak istochnik sovetskogo prava i zakonotvorchestva," [Revolutionary Consciousness as a Source of Soviet Law and Law-making] *Istoricheskie, filosofskie, politicheskie i iuridicheskie nauki, kul'turologiia i iskusstvovedenie. Voprosy teorii i praktiki* no. 9, part II (2014): 90.

[4] See Akop P. Nazaretian, "Sovest' v prostranstve kul'turno-istoricheskogo bytiia: (Polemicheskie zametki)," [Conscience in the Space of Cultural-Historical Existence: Polemical Notes] *Obshchestvennye nauki i sovremennost'* no. 5 (1994): 152-160; Evgenii E. Stefanskii, "Kontsept 'sovest' v russkoi, pol'skoi i cheshskoi lingvokul'turakh," [The Concept of "Conscience" in Russian, Polish and Czech Linguistic Cultures] *Izvestiia Rossiiskogo gosudarstvennogo pedagogicheskogo universiteta im. A. I. Gerzena* no. 72 (2008): 124-131.

[5] Portugalov, 23.

[6] Clearly, the absence of a penal code *per se* does not make a legal system "revolutionary" or "emotional". I am well aware of a strong and stable common law tradition in the United States, United Kingdom and elsewhere. However, in the Anglo-American tradition there are other mechanisms of maintaining internal consistency and preserving legal tradition (records of the courts, yearbooks and other collections of case law) – as well as strong (even if sometimes challenged) limitations on the legitimate use of emotions in the courtroom.

[7] Vadim I. Musaeu, *Prestupnost' v Petrograde v 1917-1921 gg. i bor'ba s nei* [Crime and the Struggle Against It in Petrograd, 1917-1921] (St. Petersburg: Dmitrii Bulanin, 2001), 169.

[8] Terry A. Maroney, "The Persistent Cultural Script of Judicial Dispassion," *California Law Review* 99, no. 2 (2011): 629-681; Eadem, "Angry Judges," *Vanderbilt Law Review* 65, no. 5 (2012): 1207-1286; Carol Sanger, "Legislating With Affect: Emotion and Legislative Law Making," in *Passions and Emotions*, ed. James E. Fleming (New York and London: New York University Press, 2013), 38-76.

[9] "O sude," [On Courts] *Sobranie uzakoneniĭ i raspriazhenii rabocheĭ i krest'ianskogo pravitel'stva* (hereinafter referred to as SU) no. 26 (1918): 404.

[10] Aron N. Trainin, "O revoliutsionnoi zakonnosti," [On Revolutionary Consciousness] *Pravo i zhizn'* 1 (1922): 5; Nikolai M. Totskii, "Pravo i revoliutsiia," [Law and Revolution] *Pravo i zhizn'* 1 (1922): 9, 10.

[11] Portugalov, 5-6.

[12] Ibid., 40.

[13] Ibid., 18. On Petrazhitskii and his reception in the early Soviet period, see Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (Oxford: Clarendon Press, 1987), 213-290 and Ara G. Khochoian, "Razvitie idei psikhologicheskoi shkoly prava v trudakh M. A. Reisnera i IA. M. Magaznera," [The Development of the Psychological School of Law in the Works of M. A. Reisner and IA. M. Magazner] *Pravo i gosudarstvo* no. 9 (2008): 132-135.

[14] Murray Frame, "Crime, Society and 'Revolutionary Conscience' during the Russian Civil War: Evidence from the Militia Files," *Crime, History & Societies* 17, no. 1 (2013): 129-150.

[15] Anatoly V. Lunacharsky, "Revoliutsiia i sud," [Revolution and the Court] *Pravda*, 1 December 1917.

[16] Portugalov, 19.

[17] Ibid., 20-21.

[18] Ibid., 32, 45.

[19] Early Soviet law, however, did not give much weight to formal proofs, which were perceived as an anachronism on the level of religious oaths or medieval trials by combat, by ordeal, or by fire (Portugalov, 28).

[20] Portugalov, 24-26. Importantly, Portugalov did not favor each and every type of emotional judgment. For example, he dismissed the bourgeois conscience with its notion of inner conviction as being arbitrary, uncontrollable, and indeed too emotional (Portugalov, 44-45).

[21] Portugalov, 47. The early Soviet 'people's courts' consisted of a judge and two assistants (*narodnye zasedateli*) who were supposed to exercise external control on the judge but in reality were given mostly administrative/technical tasks. The question of how their potentially divergent emotional attitudes could be mediated to arrive at a common decision is an interesting one, but it is not addressed in Portugalov's treatise.

[22] Portugalov, 24, 38-39, 49.

[23] See Vladimir I. Lenin, *Gosudarstvo i revoliutsiia* [The State and the Revolution] (Petrograd: Zhizn' i znanie, 1918).

[24] Portugalov, 46.

[25] Ibid., 31.

[26] Ibid., 31-32; Mikhail A. Chel'tsov-Bebutov, *Sotsialisticheskoe pravosoznanie i ugovnoe pravo revoliutsii* [Socialist Legal Consciousness and the Criminal Law of the Revolution] (Kharkiv: NKIU USSR, 1924), 50, 54.

[27] "O wedenii v deistvie Ugolovnogo Kodeksa RSFSR," [On the Enactment of the Penal Code of the Russian Soviet Federative Socialist Republic] *SU*, no. 15 (1922): 1.

[28] Vladimir N. Brovkin, "Kul'tura novoi elity, 1921-1925," [The Culture of the New Elite, 1921-1925] *Voprosy istorii* no. 8 (2004): 83-98; Vladimir P. Buldakov, "Destruktsiia lichnosti revoliutsionera v Rossii, 1920-e gg.," [The Destruction of the Revolutionary Individual in Russia in the 1920s] in Nikolai V. Mikhailov et al., eds., *Chelovek i lichnost' v istorii Rossii: konets XIX-XX vek* [History and Subjectivity in Russia, late 19th – 20th Centuries] (St. Petersburg: Nestor-Istoriia, 2013), 162-182.

[29] Il'ia V. Slavin, "2Sud i novaia ekonomicheskaia politika," [The Courts and the New Economic Policy] *Ezhenedel'nik sovetskoi iustitsii* 1 (1922): 7.

[30] See Nikolai S. Plotnikov, ed., *Pravda: Diskursy spravedlivosti v russkoi intellektual'noi istorii* [Pravda: Discourses of Justice in Russian Intellectual History] (Moscow: Spravedlivyi mir, 2011); Alexander Haardt, *Gerechtigkeit in Russland: Sprachen, Konzepten, Praktiken* (Paderborn: Fink, 2013) and Alfred Sproede, Georg Schomacher and Oleksandr Zaborko, eds., *Osteuropäische Rechtskultur: Studien zu Literatur und Recht in Russland und der Ukraine von der Frühen Neuzeit bis zur Gegenwart* (Paderborn: Fink, 2013). For different perspectives on the rule of law in late Imperial and early Soviet Russia, see, e.g., Laura Engelstein, "Combined Underdevelopment: Discipline and the Law in Imperial and Soviet Russia," *The American Historical Review* 98, no. 2 (1993): 338-353; Jörg Baberowski, "Das Justizwesen im späten Zarenreich 1864-1914: Zum Problem von Rechtsstaatlichkeit, politischer Justiz und Rückständigkeit in Russland," *Zeitschrift für neuere Rechtsgeschichte* 13, no. 3-4 (1991): 156-172; Jane Burbank, *Russian Peasants Go To Court: Legal Culture in the Countryside, 1905-1917* (Bloomington and Indianapolis: Indiana University Press, 2004).

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