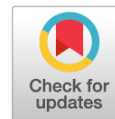


# Game Genesis of Justice in the Teachings of Huizinga



**Tsvetkov Yuri,**

Head of the research Department  
Moscow Academy of the Investigative Committee of the Russian Federation,  
Candidate of law, docent,  
Moscow, Russian Federation  
E-mail: Yutsvet@yandex.ru

**Abstract.** *The article presents the concept of the “game origin of justice,” developed by the Dutch historian and philosopher Johan Huizinga, in the context of the general teaching about human culture as a game. From the work of the historian, the game signs are distinguished, and the definition of its concept is formulated. The highlighted game signs correlate with the justice signs. The interpretation of some proto-legal phenomena and statements about their gaming origin are compared with the points of view of other legal historians, namely, J. Davi and V. Ehrenberg. This paper presents the author's interpretation in relation to contemporary developments in the law. An explanation is given for why the theory about the game origin of justice has not received support and development in the lawyers' work. The identification of justice with a religious cult is carried out through similar gaming practices. The paper concludes by stating that there are direct genetic links among the game, justice, and religious worship. It is hypothesized that the theory about the game origin of justice can be considered a special case of a higher-level theory about the origin of state and law from the game.*

*Keywords:* game, court, justice, competition, origin of law and state.

Humans as a biological species are called homo sapiens (“wise man”) and homo faber (“tool making man”). The Dutch historian Johan Huizinga (1872–1945) introduced a third definition: homo ludens (“playing man”). He added that not only do people play, but animals do as well. Humans did not add anything new to the signs of the game, meaning that games are older than the culture. However, the culture itself not only contains a game element but also arises in the game and unfolds as a game. Huizinga outlined his comprehensive concept in the work “Homo ludens. Experiments in determining the game as the element of culture” [1, p. 416]. It was published in 1938 on the eve of World War II and the Nazi occupation of the Netherlands. The disturbing historical setting of the book's creation was described in his reflections on the transformation of the game in world politics. This led to confiscation of the German edition of the book and the author's arrest.

Lawyers always try to find rational explanations for those institutions whose origins are so obscure that it is impossible to reliably reveal their genesis. In these persistent attempts, the main source of cognitive distortions in historical science is revealed, the effect of “Reverse Thinking” discovered by B. Fischhoff. A person “in the back of his mind” is inclined to sum up logical grounds for

fundamentally unpredictable events [2, p. 349–358]. Authoritative scientists who have defended their doctoral dissertations on the topic of judicial power link the genesis of the court to the origin of the state. They prove the inevitability of its appearance by the need for an independent arbitrator to resolve disputes [3, p. 94–99; 4, p. 163–186; 5, p. 13–26]. By virtue of the same effect, these scientists and thinkers do not admit that justice could have been born accidentally as a stepchild of some frivolous activity, as in a game, for example. Even Richard Posner, identifying nine concepts of judges' behavior, mentions the theory of games only in the purely mathematical sense of choosing winning strategies in court proceedings. He does not say anything about the relationship of justice to the game in its traditional sense [6, pp. 29–31].

Huizinga emphasizes that the concept of the game, for all its apparent obviousness, has not been clearly defined. What is certain is that the game is the converse of seriousness. At the same time, the game is not stupid. Children and professionals participate in it with great seriousness. The historian, consistently searching for signs of the game, comes to his own author's definition of this phenomenon. Although he does not use the term “features” and does not distinguish them structurally, it is still possible to isolate them from the content of the first three chapters:

- *free action* — people enter the game because they want to play. They do it to derive pleasure from the process. A forced game is not a game;
- *non-real character* — the game is not ordinary, real life. Entering it, a person passes from real life to non-real and back. Even a child is aware of this transition;
- *redundancy*—the game does not satisfy any physiological needs and does not fulfill a moral duty. It is engaged in free time and it can always be interrupted and postponed for later;
- *limited time and space* — the game starts and ends at a certain time and takes place in the perimeter of the “game space.” The latter is characterized by a certain order, on which the aesthetics of the game are based;
- *tension* — the game requires certain efforts aimed at successfully passing a certain test, and, as a result, leads to discharge.
- The presence of *rules*, which are indisputable and mandatory, presupposes their honest and conscientious execution. Noncompliance, or improper compliance with the rules of the game, destroys it. Accordingly, there are two types of offenders: Rascals and Spellbreakers. Rascals, who outwardly express their obedience to the rules, tend to secretly break them, to their advantage. Spellbreakers are those who are out of the game or openly deny the rules (heretics, renegades, and dissidents);
- *Uncertainty* of the outcome during the game means the question always remains: will the player be lucky or not? This issue is present even in solitary games (solitaire, crossword puzzles, etc.). The outcome is not known in advance, which is important both for the player(s) and spectators (supporters) involved in the games.
- The game is focused on *winning*, which occurs only in case of its competitive nature. The amount of the winnings can be determined by the bet, the object at stake. By winning, the player rises as a result of the game. Therefore, winning, especially publicly, is more than just receiving the bet amount; it is the acquisition of honor, respect, and admiration. Winning is something that the winner is proud of, so even if the game entails a single player, the player with a positive outcome gets pleasure, feels proud of himself [1, pp. 22–132].
- Thus, the game is a voluntary activity, within the limits of place and time, according to rules that are mandatory for all, with the goal being the activity itself, accompanied by feelings of tension and pleasure, with the awareness of being different from everyday life, taking place in an atmosphere of uncertainty in its outcome, and rewarded by winning one or a group of players.
- Exploring the name of the game in the language of various peoples, Huizinga comes to several important discoveries. In a number of languages,

the game is expressed by a single word, as, for example, the Latin *ludus*. In other languages, two words or styles of word formation are used to name similar processes at once. So, in Greek, the game is indicated by the suffix *inda*. For example, a ball game is called *spherinda*. Along with this, the Greeks use a special word *agon*, which denotes competitions and duels. In particular, what we call the Olympic Games were designated by ancient Greeks as *agon*. Huizinga, however, insists on the fundamental identity of play and competition, saying that there is not a single feature of play that cannot be applied to *agon*. For the purposes of our work, this is a very important provision, since in legal proceedings *agonal*, indicating the adversarial nature of the game, holds a key meaning.

Huizinga traces the influence of the game on culture and the social nature of people's lives throughout their history. The game tendency reaches its peak in the 18th century with the successive styles of Baroque and Rococo. Excess is the principle underlying both styles, and it is also one of the hallmarks of the game. It permeates even the art of government. The petty principalities of Europe become the playthings of their short-sighted and irresponsible monarchs and ministers. The situation changes dramatically in the 19th century, where seriousness became the antonym of the game and a sign of good taste (here, we should recall the masterpieces of Victorian drama, including the play by Oscar Wilde, “The Importance of Being Earnest”). The main ideals of this century — benefit and wellbeing — correspond to the leading ideological trends: rationalism and utilitarianism. There is a general belief in the omnipotence of the economic factor as the main engine of progress, which the historian evaluates only as a “shameful error” [1, p. 266]. An indicator of the triumph of practicality over excess as a principle of life is the evolution of men's costumes. If its form changed every 30 years for several centuries, and long trousers were worn only by peasants, fishermen, and sailors, in the 19th century, men's suits acquired a simple straight silhouette and dull color that remain unchanged to the present time.

Although already in a refracted form, the game principle again breaks through the veil of seriousness in the 20th century. Sport becomes (and remains in the 21st century) the most important cultural phenomenon. However, due to the division into amateur and professional, while maintaining its archaically competitive nature, sport loses its game and adopts a serious character, especially for professionals, for whom it is definitely not a game, but a job. With regard to its game content, sport, according to the historian, has lost all the best. However, at the same time, there is also a reverse transformation when some areas of

material production acquire game features. For example, the concept of a record has moved from sports life to business life, and the introduction of statistical evaluation methods has turned industry into a competition between entrepreneurs. We can also add to this the competition between law enforcement agencies (courts, investigative units, and internal affairs agencies) as the best indicators of statistical reporting. Huizinga's competitive gaming motives are also found in modern science, long before the appearance of the famous Hirsch index. Here however, the scientist sends a warning to the future: "A genuine desire to know the truth through research does not appreciate the triumph over the enemy" [1, p. 282].

Defining the game content of modern politics, Huizinga discovered a phenomenon for which he proposed his own term: puerilism. In contrast to the child's self-absorbed play, this phenomenon resembles the behavior of an irresponsible teenager. As an example, he cited the experiments of the Bolsheviks on their people's lives. However, he mainly meant the fascists, about whom in 1938 he could not write openly. Puerilism is characterized by such properties as a craving for banal entertainment and cheap sensations, a brisk spirit of unions with their ceremonial and insignia, a lack of a sense of humor, a desire for extremes, intolerance of "outsiders." As a result, he does not recognize game nature of puerilism, although he notes some external similarities with the game.

The game in accordance with the theory of Huizinga permeates such spheres of human life as military affairs, wisdom and philosophy, poetry, art, and even religious worship. However, the most unexpected is the scientist's statement that the basis of law and justice also lies in the beginning of the game. The Dutch historian was not the first to make such a claim. French sociologist Georges Davie also described the practice of the Kwakiutl Indian tribe, known as potlatch. This name in ethnology refers to a competition in giving, when each clan gives the most valuable thing it has to another clan, a process accompanied by dancing, singing, demonstrations of masks, and dances of sorcerers. The gifted clan, in turn, becomes obliged to make reciprocal gifts and at the same time surpass their "rivals" in generosity, as well as contempt for wealth, by publicly destroying the most valuable objects of their property. This form of celebration accompanies all significant events in the life of the clan (birth, marriage, death, etc.). Davie considered potlatch to be an archetypal form of the system of making transactions and taking obligations [7, p. 137]. True or not, one of the oldest sources of international law, the principle of reciprocity, is homeomorphic to potlatch, which was at first an intergenerational practice and then became an international one.

Huizinga identifies the following features of justice that are related to the game:

a) The presence of a specially designated place for its administration, which is, as a rule, a sacred space, the entry into which makes a person (a judge) inviolable;

b) the judge exited everyday life, the symbol of which is the re-exposure in a mantle and a wig. The wig, according to Huizinga, was a continuation of the old distinguishing sign of English legal experts—a tight-fitting white cap—which is still represented by the white edge of the wig of an English judge. Both harken back to the archetype of the primitive dance mask, which transforms a person into a different being;

c) agonality, the spirit of a duel aimed at achieving the victory of one of the parties (the example of the ancient Germans, who, in the presence of a land dispute, set the boundaries of the mark within the range of throwing an ax);

d) a system of strict restrictive rules, what we call procedural law;

e) the element of chance, mediated in archaic legal systems by lot or duel, as well as by weight, the motif of which was first noted in Homer's "Iliad," where Zeus determines the fate of the opposing sides (Achaeans and Trojans) by scale weight;

f) the winner receives a prize or reward (amount of the claim) [1, p. 118-132].

Huizinga distinguished three game forms in legal proceedings: a game of luck, a contest or wager, and a verbal duel. The latter form was developed in modern trial speaking. An archaic example of its game incarnation is the drum duel of the Eskimos. If one Eskimo has any claims against another Eskimo, akin to a lawsuit, they go out to a song duel to the beat of their drums. In their song improvisations, they compete by cursing each other, accusing and insulting each other, accompanied by physical impact (breathing in the face, sniffing, pushing, etc.). The accused must bear all this without a murmur, and then they change places. The contest is held in the form of a meeting (the villagers sit around the disputing parties), and it can continue, with interruptions, for several days and even months and years. The Eskimo drum duel is just one of the varieties of a whole kind of competition that was very common in archaic and medieval culture — the cursing duel. Today, its pure rudiment is the debate of the parties.

According to Huizinga, even the most serious of all possible activities — religious worship — is a game. And here, in his theory, there is an implicit, game-mediated connection between the administration of justice and the sacred rite. The Austrian historian of antiquity Victor Ehrenberg in his book "The Legal Idea in Ancient Greece"

stated, "Secular justice grows from God's judgment" [8, p. 75]. However, Huizinga considered such a concept limited, since, in his opinion, a number of links in history derived from it. He argued that both the judicial process and God's judgment carry a single primary image — the *agon*.

At a deeper consideration, both points of view are consistent. Huizinga referred to Plato, who called the sacrament a game. The historian highlights the isolation of a sacred place (a tennis court, a chessboard, a temple, or a magic circle are all one and the same); the unrestrained feeling and exaltation with which players indulge in the game and believers indulge in the service; the transition from the ordinary world to the mystical; and rituals of sacrifice, performed according to strict rules that are accepted by all participants. Huizinga, however, makes a witty reservation that one can play below the level of seriousness, as children do, or above it, as adults do in the game of cult, and we will also add here the game of justice.

It seems that both Ehrenberg and Huizinga are right in their own way; there are no deep contradictions in their views. Legal proceedings are a game, but it is the game of God. The judge disguises himself in priestly garb. He is a servant of the cult of the goddess Themis. He explains his rights in a rapid recitative, or announces court rulings like a sexton reciting a psalter, or a shaman reciting a spell. He retires to the council chamber as a priest to the altar. The secret of the conference room is sacred and inviolable. Why? Because there is a sacrament similar to the Eucharist: the union of the law and the conscience of the judge, which converts to justice. The imposition of imprisonment is a symbolic banishment from paradise, with the death sentence as a ritual sacrifice.

Huizinga goes no further than to assert the presence of a game element in justice. However,

his teaching would have been more complete in this part if, via justice, he had deduced the origin of law and the state from the game phenomenon. The historian makes allusions to this when he speaks of the playful nature of 18th century European politics and 20th century puerilism. However, he confines himself to these allusions. Perhaps humanity, in the search for game genres, began to practice a game called "the state," and then played so much that it could not get out of the playing process? It is even likely that the players awarded the masters' roles did not allow those who got the subjects' roles to leave the game in the future. The hypothesis we presented completes this article but reveals the prospect for a new study.

## References

1. Heisinga J. *Homo ludens. Man playing*. Saint Petersburg: Ivan Limbach Publishing House, 2015.
2. Fischhoff, Baruch. Perceived informativeness of facts. *Journal of Experimental Psychology: Human Perception and Performance*. 1977;3:349-358.
3. Voskobitova L.A. The Court and the fight against crime. *Russian criminological view*. 2005;(1):94-99.
4. Kolokolov N.A. *Judicial power: from the slogan to the understanding of reality*. Moscow: Lawyer, 2010.
5. Mikhailovskaya I.B. Judicial power in the system of separation of powers. *Judicial power*. Moscow: Prospekt, 2003. P. 13-26.
6. Posner, Richard A. *How Judges Think*. Cambridge, Massachusetts: Harvard university press, 2010.
7. Davy G. *Oath of allegiance. Research on the sociology of the contract*. These. Paris, 1923.
8. Ehrenberg V. *Legal idea in early Greece*. Prag: S. Hirzel, 1921.

## Игровой генезис правосудия в учении Хёйзинги

**Цветков Юрий Анатольевич,**

заведующий научно-исследовательским отделом  
Московской академии СК России,  
кандидат юридических наук, доцент  
г. Москва, Российская Федерация  
E-mail: Yutsvet@yandex.ru

**Аннотация.** В статье излагается концепция игрового происхождения правосудия в контексте общего учения нидерландского историка и философа Йохана Хёйзинги о человеческой культуре как игре. Из работы историка выделяются признаки игры и формулируется определение ее понятия. Выделенные признаки игры соотносятся с признаками правосудия. Трактовка некоторых протоправовых феноменов и утверждения об их игровом происхождении сопоставляются с точками зрения других историков права: Ж. Дави и В. Эренберга; предлагается их авторская трактовка в связи с современными явлениями в праве. Приводится объяснение того, почему теория игрового происхождения правосудия не получила поддержки и развития в трудах юристов. Проводится тождество правосудия с религиозным культом через посредство схожих игровых практик. Делается вывод о том, что между игрой, правосудием и религиозным культом есть прямая генетическая связь. Высказывается гипотеза о том, что теория игрового происхождения правосудия может рассматриваться как частный случай теории более высокого уровня о происхождении государства и права из игры.  
**Ключевые слова:** игра, суд, правосудие, состязательность, происхождение права и государства.

### Список литературы

1. Хёйзинга Й. Homo ludens. Человек играющий / Сост., предисл. и пер. с нидерл. Д.В. Сильвестрова. СПб.: Издательство Ивана Лимбаха, 2015.
2. Fischhoff, Varuch. Perceived informativeness of facts // *Journal of Experimental Psychology: Human Perception and Performance*. 1977. Vol. 3. P. 349–358.
3. Воскобитова Л.А. Суд и борьба с преступностью // Российский криминологический взгляд. 2005. № 1. С. 94–99.
4. Колоколов Н.А. Судебная власть: от лозунга к пониманию реальности. М.: Юрист, 2010.
5. Михайловская И.Б. Судебная власть в системе разделения властей // Судебная власть / Под ред. И.Л. Петрухина. М.: Проспект, 2003. С. 13–26.
6. Posner, Richard A. How Judges Think. Cambridge, Massachusetts: Harvard university press, 2010.
7. Davy G. La Foi jurée. Etude sociologique du problème du contrat. These. Paris, 1923.
8. Ehrenberg V. Die Rechtsidee im fruhen Griechentum. Prag: S. Hirzel, 1921.