

THE SOCIAL, LEGAL AND COMMUNICATION CHALLENGES OF BEING A TRANSGENDER PERSON

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Abstract

Most of the contemporary societies are organized on the basis of a binary gender concept, according to which each individual is rigidly gender-defined in the framework of the dichotomous division to male and female gender. A certain number of people do not identify themselves with the sex allotted to them at birth, a problem arising regarding their inner comprehension of gender, which does not correlate to the sex. Those people are called transgender people. Due to the fear of being stigmatized, and not complying with the generally accepted social and moral norms, these persons are uniformly put into one of the two socially determined genders – male and/or female gender. By this act they become socially, medically and legally “invisible bodies”. The right to sexual orientation and gender identity is a universal human right. Therefore, problems of transgender people should be dealt with from the point of protection of fundamental human rights. However, for transgender persons, persons of the “third gender”, adjustment of gender identity in the Republic of Serbia is a restrictive and conditioned right – it is conditioned by a medical treatment lasting for a year and the opinion of competent medical professionals – endocrinologists and psychologists. Moreover, they face discrimination in all the spheres of public life, including the language used when referring to them. The authors in the paper discuss the legal procedures of adjustment of gender identity and the consequences that preconditioning by the perennial medical treatments leads to. Such legislative causes the “vacuum” regarding the living and legal conditions, which results in these persons being “trapped in the wrong body”.

Keywords: transgender, discrimination, human rights, legal adjustment of gender identity, the registers

INTRODUCTION

In a global sense, temporary society functions according to the bipolar principle, i.e. the dichotomy of male and female sex. The definition of gender and gender identity has been made on the basis of such a dimorphic concept of society. A person's sex is a biological fact, usually confirmed at the very birth, firstly on the basis of genital anatomy or physiological organic difference, and we define it as male or female. While, on one hand, sex is a biologically given concept, gender, on the other, represents a social cultural interpretation of male or female sex. Gender is our interpretation of anatomy and biology, which has everyday consequences in the lives of all of us. In this manner “human beings as biological entities are categorized as male and female” [1]. This consequently means that all the individuals are strictly gender-defined in the scopes of the dichotomous division to male and female gender only. However, gender identity that a person will attribute to themselves does not have to match with the one imposed on them regarding their sex identity [1], [2]. As seen in the literature, these persons go beyond this gender binarism in social practice by their non-binary defined identities. They are in the first place trans people [3], and according to the topic of this paper we are talking about transgender people. Trans or trans* is an umbrella term signifying people whose gender identity is different from the sex allotted to them at birth.

Although the terms *transgender people* and *transsexual people* are somewhat synonymous, there is a slight difference in meaning in the aspect that transsexual people usually undergo a surgery of gender change, while transgender people do not. Here are some definitions illustrating the difference:

transgender (adj): of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth; *especially*: of, relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth [4];

transsexual (adj): of, relating to, or being a person whose gender identity is opposite the sex the person had or was identified as having at birth; NOTE: Transsexual people may or may not undergo surgery and hormone therapy to obtain a physical appearance typical of the gender they identify as [4].

Let us refer to a different source now:

transgender (adj): describing or relating to people whose sense of gender identity does not match their biological sex or does not easily fit in with the usual division between male and female [5];

transsexual (n): a person who feels emotionally that they want to live, dress, etc. as a member of the opposite sex, especially one who has a medical operation to change their sexual organs [5].

We use as a reference the online versions of Merriam Webster's and Oxford Dictionaries as supposedly the most updated versions, since if one looked into some older printed editions, they would not even find the term *transgender*, only *transsexual*. In even older ones, both English and English-Serbian dictionaries, there are neither of these terms, only *transvestite*, which has a totally different meaning and usage.

Transgenderism is a term referring to people of various gender identities, expression and behavior, which are not traditionally related to their sex and the traditional notion of gender roles [6: 51]. We are using the term *transgenderism* in this context as a noun form of the adjective *transgender* in the absence of a "better" one, since there still cannot be found the noun form in any of the dictionaries treating this topic. The only form we have come across is the one mentioned above, but just as a suggestion of a noun form in the entrance of an adjective *transgender*, without any detailed explanation of the meaning of the very word. [4]

The public is generally not well acquainted with the meaning of these words and often use them inadequately and wrongly, moreover often using offensive words to refer to transgender people. The social awareness concerning this topic is at a very low level. Therefore, instead of addressing a transgender person as a transgender woman (male to female adjustment), or a transgender man (female to male adjustment), they sometimes go so far as addressing them with *it*, which is highly offensive and completely unacceptable.

Although the issue of transgenderism is considered a problem of the contemporary age, the historical facts point to some cases of people not being able to strictly fit in the existing bipolar social concept even in the oldest civilizations. Therefore, back in the folklore of Ancient Greece there were present elements pointing to the existence of awareness of the third gender. In various cultures there is a series of categories that signify trans people. There is an example of Hijra in Indian culture. Those are people who are "neither male nor female" and represent the extinctive example of ritual initiation into the third gender, in which the act of castration is mandatory [7]. In Germany, at the time of the Weimar Republic, Berlin was considered a very liberal city, in which the biggest number of LGBT movements were active. In 1931 Dora Richter became the first publicly known trans woman who had undergone the gender adaptation procedure [7].

Transgenderism in Serbia is not a "foreign product", the latest fad or a result of weakening of the family and personal moral standards. On the contrary, the tradition of the Balkan nations (as well as many other nations) recognizes various social mechanism of acceptance of individual cases of deviation from the patriarchal imperative of gender binarism. "Normalization of the unusual", non-acceptance of the birth sex could be realized only under certain conditions and in certain circumstances, and it has never appeared as a stand-alone reason of social acceptance of transgenderism. Those other circumstances were primarily the issues considered as benefits for the family and society, in cases of a lack of male offspring, for instance, threats with vendetta to male members of one family, non-acceptance of an arranged marriage or otherwise violating the realization of an engagement by a female person, their singleness, death, a long-lasting illness or disability of male offspring and similar. The first surgery of gender adjustment in the Republic of Serbia was performed in 1989. Nowadays, the Republic of Serbia

represents a “country of health tourism”. Belgrade has become one of the world’s best-known health centers for this kind of intervention – a surgery of body adjustment to gender identity. Despite this fact, transgender people are facing a number of problems (just like they do around the world). Experiences documented by trans activism clearly point to a high level of their traumatization, very often starting from the earliest phases of their growing up in a strictly patriarchal gender binary context of the society [8].

For centuries these people have been exposed to homophobia, transphobia and other forms of widespread and lasting intolerance based on their sexual orientation or gender identity, leading to hostile acts in the range from social exclusion to discrimination in all the areas of everyday life. As a result of this situation, a large number of people have to either hide or suppress their identity and to live their lives in fear and invisibility, even in their own family, this way becoming the so-called “invisible bodies” [9: 119-120]. In such a social background, transgender people are “not recognized” either in institutions or the legal system. Therefore, it is usually emphasized that the biggest problem of the whole trans* population is generally of administrative bureaucratic nature. This is just one of the reasons why according to almost all of the national and foreign reports of the organizations dealing with the situation of human rights, it is emphasized that transgender people belong to one of the most discriminated populations in our society. Transgender people are exposed to discrimination, hatred, transphobia and verbal, physical and institutional violence [10].

TRANSGENDER PEOPLE AND THE FUNDAMENTAL HUMAN RIGHTS

“Everyone has the right to recognition everywhere as a person before the law” states the article 6 of the Universal Declaration of Human Rights [11]. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. For the first time, it sets out fundamental human rights to be universally protected and it has been translated into over 500 languages. Since sexual orientation and gender identity of every person represent an integral part of their personality and belong to one of the basic aspects of self-definition, dignity and freedom regarding Yogyakarta Principles (Principle 3) [12], the analysis of the status and position of transgender people must be approached from the aspect of protection of fundamental human rights. The current practice shows different treatment of transgender people in Europe, from the countries which fully cover the medical interventions (endocrinological and surgical procedures, as well as psychotherapy) and have a developed support system for transgender people, to the countries in which there are great problems and neglect of transgender people’s needs [13: 15]. Striving to create a more tolerant European space, the European Commission launched an announcement on 16 July 2012, that countries which are to run for membership in EU will not be accepted if there are any documented cases of bad treatment of LGBTI (abbreviation of Lesbian, Gay, Bisexual, Trans, Intersex) people. In the context of the European Union Council Framework Decision 2008/913/JHA of 28 November 2008 [14] on combating certain forms and expressions of racism and xenophobia by means of criminal law, the member countries have an obligation to “undertake the necessary measures in order to make sure that racist and xenophobic motivation will be considered an aggravating circumstance or, optionally, that such a motivation will be taken into consideration by courts in defining sentences” [15: 221]. In that manner, the Republic of Serbia introduced by the criminal legislation (as an aggravating circumstance) a new form of qualification of a criminal act performed out of hatred. Article 54a of the Criminal Code states that “if a criminal act has been performed out of hatred due to the fact of another person’s belonging to a certain race and religion, their nationality or ethnicity, sex, sexual orientation or gender identity, that circumstance will be considered as an aggravating circumstance by the court, except in case it is regulated as a criminal act” [16].

Although back in 1989 in the Resolution of the European Parliament against Discrimination of Transsexual People the member states were required to undertake certain steps of protection of transgender people and adopt the appropriate legislation, and, among other things, make accessible the information about the problems that transgender people face, especially with the personnel of social services, police, border authorities, the registers, military authorities etc. [9: 47-48], in the norms and

practice more attention has been devoted to LGB population, while T – transgender population has been neglected and marginalized. In other words, more attention is devoted to the right to sexual orientation than to the right to gender identity of this group. The issue of gender identity and gender minorities is being omitted both in legal documents and various researches, brochures, etc. [17]. Attitudes towards the people of the “third gender” have been radically changing in past years, by striving to recognize these “invisible bodies” as subjects of the law. Examples of good practice in sensibilization of the social atmosphere and understanding of the needs of transgender people can be seen in the practice of certain countries a lot before introducing some crucial acts about trans population in general. For instance, in France transsexuality and transgenderism have not been included in the official classification of mental disorders since 2009, which means a lot before the stating of the World Health Organization. In 2012 Australia introduced passports which offer a special label for people who do not identify themselves as either male or female, as well as some new legal acts regarding the change of documents without the surgical intervention of gender change [13: 16]. In 2012 in Argentina the Law on Gender Identity was introduced which allows every person to identify their gender in official documents according to their own choice.

The World Professional Association for Transgender Health – WPATH, the creator of the last, reviewed, seventh version of the “Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People” has been putting a lot of effort towards cancellation of any kind of pathologization of all trans and gender nonconforming people [13: 16-17]. An important step in the direction of sensibilization of the social atmosphere, and with the aim of a better “visibility” of these people is the document of the Parliamentary Assembly of the Council of Europe “Discrimination against transgender people in Europe” adopted on 22 April 2015 [18]. For further treatment of transgender people it is important to mention the European Parliament Resolution of 14 February 2019 on the rights of intersex people [19], by which the Parliamentary Assembly of the Council of Europe invited the member countries to guarantee transsexual people the right to change the information in personal documents regarding their gender, without it being conditioned by a prior sterilization or other medical interventions such as gender change or hormone therapy. A significant progress connected to the status of transgender people has been made during the past years through the jurisprudence of European courts, parallel with the legislative and other activities coming from other European institutions. In judgements brought by the European Court of Human Rights in cases of lawsuits by trans people, principles substantial for a more dignified social and legal status of trans people (transsexual, transgender, transvestite) have been established, since they are based on the extension of human rights in the broadest possible interest of these people. In order to make it possible for their new identity to be fully integrated into their private and professional life, with a complete respect of the right to privacy, the court intention is that equal legislative treatment based on sex should be provided based on the new, acquired sex, and not the sex allotted at birth. The notion of “private life” in general does not exclude the actions of professional or business nature [20]. Actually, private life includes the right of an individual to establish and develop relationships with other people, including relations of professional and business nature [21], [22]. Therefore, restriction of access to a profession affects a “private life” [23]. This is relevant for issues related to employment, equality in payments based on work and social protection, pension and other social economic rights, since they are acquired according to the present state – present gender, in relation to the mentioned court practice. Out of respect for private life there comes the “right to define the details of personal identity and self-definition, and therefore the right to adjust one’s sex to their gender identity” [24: 10]. This was a historic decision since the countries that still used the precondition of sterilization for the legal recognition of gender identity had to change their laws [25]. In case Y.Y. against Turkey, the court pointed out the freedom of gender choice as an essential expression of freedom and part of the right to self-definition [26]. The European Court of Human Rights also defines the obligation to manage the principle of legal continuity of identity, rights and obligations, before and after the hormone operation process of gender adjustment, as well as the principle of relevance of the newly acquired gender of the person [27], [28], [29], [30].

THE LEGAL PROCEDURE OF ADJUSTMENT OF GENDER IDENTITY IN SERBIA

In accordance with the recommendations of the European Commission (in 2012) and European Parliament (in 1989) to the countries running for the membership in EU to undertake certain actions of protection of transgender people and adopt the appropriate legislation, and therefore for the very member countries to make available the information about the problems that transgender people face, especially in contacts with personnel of social services, police, boarder authorities, registry offices, military authorities and other, the Republic of Serbia adopted the amendments to the Law on Registers on 20 June 2018. [31]. According to article 45b of the new Law on Registers, in relation to article 6, paragraph 2 and 4 of the Law on Registers, the information on gender change based on the resolution of a competent authority (municipal administration office, city administration office, city administration office of the city of Belgrade) is entered into the birth certificate register. [31]. The resolution is brought on the basis of a certificate of a competent health institution (article 45b, paragraph 1 of the Law on Registers). More details about the way of issuing the certificate and the very template of the certificate on gender change, issued by a competent health institution, are regulated by the Rulebook on the way of issuing and the very template of a certificate of a competent health institution on gender change. [32]. The Rulebook is brought by the agreement between the Minister of State Administration and Local Government and Minister of Health based on article 45b, paragraph 5 of the Law on Registers.

The condition for a competent health institution to issue a certificate on gender change, according to article 3 of the Rulebook, is: 1) the undertaken at least one-year-long hormone therapy with indication and control of a psychiatrist specialist and endocrinologist specialist, or 2) the performed surgical intervention of gender change. A certificate on gender change is delivered by a competent health institution to the competent authority that keeps the birth certificate registers for the person who has changed their gender either: 1) after the procedure of gender change has been terminated on the request of the person who has changed their gender, or 2) within fifteen days from the day of termination of the procedure of gender change (article 5 of the Rulebook). The certificate on gender change is a public document (article 2 of the Rulebook) and is issued on the white A4 template, which has been printed with this Rulebook and represents its integral part (article 4 of the Rulebook).

What should be pointed out as an improvement is cancellation of the former practice of mandatory genital surgery and sterilization as a precondition for the change of personal documents. However, the new legal resolution has not improved the status and legal position of this population much. Namely, in the procedure of further adjustment of gender identity, a transgender person can be registered in the birth certificate register, they can change their personal documents only on the basis of the certificate of a health institution that they have been through a psychological check-up and a year-long hormone therapy prescribed by an endocrinologist. Hence, the legal recognition of gender change is still conditioned by a medical treatment, while the only improvement is that this treatment is less invasive. This way, the situation of transgender people is only ostensibly better in the procedure of harmonization of the factual and legal state. In practice, such regulations put "on hold" the personal status of a transgender person, which leads to discrimination of transgender people based on gender identity, especially in the phase of transition, when the changes are visible but non-compliant with the sex verified in personal documents. Also, the findings and controls of physicians (a psychiatrist specialist and an endocrinologist specialist) as a precondition for a gender change in personal documents further pathologize and discriminate a huge number of transgender people who do not want or are unable to undergo the hormone therapy out of various reasons, including the risks of a negative impact on their health. Some of them do not want to undergo the hormone therapy, while the others must not do that due to some hereditary or acquired illnesses.

The whole procedure of issuing the documents necessary for a gender change in the birth certificate depends on the good will of physicians, since, as medical law experts and trans activists point out, psychiatrists and endocrinologists make the procedure of legal recognition of transgender people slower. Moreover, on the territory of the Republic of Serbia there is only one endocrinologist specialist for prescribing the hormone therapy to transgender people. Therefore, there is some kind of monopoly of the physicians who are specialized in this area. [33]. That means that months, even years may pass by until a psychiatrist gives their permission for a hormone therapy. It often happens that trans people start

taking hormones on their own. This phenomenon is called “gate keeping”. This means that someone keeps postponing the process, someone who has the power over the lives of trans people – in this case a psychiatrist [33].

The cost of gender adjustment is paid partially by a transgender person and partially by the compulsory social insurance. According to article 131 of the Health Insurance Law [34], a gender change due to medical reasons is a health service provided to insured persons from the funds of compulsory health insurance in at least 65% of the price of the health service provided (paragraph 4, point 3). This provision offers only a half-way solution to the problem, since the issue of financing the hormone therapy that is lifelong is not resolved. The legal resolution does not take into consideration a potential hormone deficit, which is frequent, while a therapy interruption leads to serious health consequences.

The change of personal information in documents is just a “tip of an iceberg” in comparison to the problems these people face. Transgender people in Serbia, as well as the total trans population, face a number of problems in different spheres of life – in the employment, access to health care and realization of health protection, during their education, in marital and family life etc. Besides, these people are often exposed to rejection, discrimination and various forms of violence from their childhood on, which can cause serious consequences for their physical and mental health [17: 4-5]. Therefore, a formal change of the name in the registers, which accompanies the gender change, is not sufficient for an essential change of their position in the society, nor for the issues regarding the status, visibility, professionalism and ethics in treating these people and so on. There are numerous examples of complete insensitivity and ignorance of our institutions when trans people are involved, generally speaking. For instance, on 24 February 2012 The Commissioner for Protection of Equality stated that the Faculty of Law, University of Belgrade, had committed an indirect discrimination act on the basis of a person’s gender, by rejecting the request of M.Đ. to change their name in the diploma, after the gender change from male to female, which was performed after receiving the diploma [35].

Although the problems of transgenderism are partially connected to the sphere of medicine, the research having been performed by organization Gayten-LGBT and the Center for sustainable development in 2006, shows that the largest extent of social distance from doctors is towards trans people actually. The same research shows that over 45% of doctors consider that “basic studies of medicine do not offer enough information on transgender population”, while 31% are not sure [13: 11-12]. Transgender people face such insensitivity and ignorance with personnel in state institutions as well. The Constitutional Court brought a decision on the constitutional appeal in 2011 about the right of a person to realize their rights according to their gender [24]. Department of General Administration of the Municipal Administration Unit of Municipality Z brought a conclusion by which, due to the lack of subject-matter jurisdiction, the request of the applicant of the constitutional appeal for correction of gender in the registers was rejected. By this act, the applicant’s right to dignity and free personality development was violated (article 23 of the Constitution of RS) [36]. The Constitutional Court stated that the substance of the allegations of the constitutional appeal on violence of the principle of prohibition of discrimination in article 21 of the Constitution was in the very fact that the gender change had not legally been recognized in the registers to the applicant. Namely, in the period when physical transition is evident due to the application of hormone therapy, but it is still non-compliant with the existing personal documents, there appear problems in de facto communication with clerks and administrative personnel in centers for social work, police, military authorities, the labor market, penal institutions, border police, campuses, sport clubs etc. On 6 February 2018, the Republic of Serbia brought the Protocol on acting with transsexual and transgender persons that are performed a criminal sanction on. The employees in the centers of social work have been provided the training on adequate services of social protection for LGBTI persons and their families [37]. It could be said that conditioning and interdependence between the legal procedure of adjustment of gender identity and medical interventions, such as going through perennial medical examinations and procedures of psychiatric, endocrinological and surgical nature, leave the legal and life status of a transgender person in “vacuum”, which leads to the situation of gender identity being the grounds for further transphobia and discrimination of transgender people in all the aspects of human rights realization. In the research of the Center for Free Elections and Democracy it has been determined that discrimination is most evident in case of seeking a work placement and during

employment, while the key performers are the state and its institutions. Also, transgender people who are open and sincere regarding their gender identity at work, are very often victims of harassment at work by their colleagues and therefore often change their jobs [17: 73].

The discrepancy between the observed gender and the one stated in personal documents to a large extent complicates or even disables employment and realization of many other social economic rights. Research shows that only 31% of the interviewed trans* people have a steady full-time job, while in Spain 54% of the interviewed trans* people are unemployed. The difficulties or impossibility of employment represent one of the factors resulting in trans* people being engaged in sex business, which leads to a multiple marginalization, violence and discrimination [17: 7]. Although 12th Yogyakarta principle called the “right to work” says that everyone has a right to respectable and productive work, to fair and satisfactory working conditions and protection against unemployment, without discrimination based on sexual orientation or gender identity, transgender people are often discriminated when employed, usually on a broader basis than lesbian, gay and bisexual population. Such practice is in discrepancy with the provisions of the Anti-Discrimination Law. [38]. This law forbids any kind of discrimination or discriminatory acts based on sex, gender identity, sexual orientation and other real or assumed personal characteristics (article 2, paragraph 1 of the Anti-Discrimination Law). The Labor Law [39] does not explicitly define discrimination based on gender identity. However, the provision of article 18 of the Labor Law could be interpreted extensively in terms of gender identity, since the law, by the open clause principle, offers a possibility of including “... some other personal characteristic”.

CONCLUSION

Considering the status and position of transgender people, it can be concluded that there are certain issues that the contemporary society does not have an open, clear and unified attitude towards. There are still topics which are considered to be taboo, such as sexual orientation and gender identity. For centuries transgender people have been one of the most vulnerable populations concerning homophobia, transphobia, discrimination, and other ways of widespread persistent intolerance, which results in social isolation and a large number of suicides among these people. Out of fear not to digress from the general socially accepted models, a huge number of people hide or suppress their gender identity (they are forced to remain “trapped in the wrong body”), this way becoming “invisible bodies” inside their families, socially, legally and in all the aspects of manifestation of an individual’s personality – education, the right to work, pension and disability insurance, health protection, sports, in the penalty system etc. In recent years the trend of depathologization of gender discrepancy has been present, since, as stated in Recommendations of the Commissioner for Gender Equality, it is a phenomenon of human diversity which must not be labelled as something pathological or negative. In that sense, the improvement of the legal position of transgender people (the whole trans population) is necessary in order to enable them to fully integrate their new identity into their private and professional lives, with due respect of their right to privacy.

Although the new regulations have cancelled the practice of a compulsory genital surgery as a condition for changing personal documents, the procedure of issuing personal documents with the aim of further harmonization of the legal and factual states is still preconditioned by a (perennial) medical treatment. Although this procedure is indisputably less invasive than a genital gender adjustment by a surgical intervention, this practice also delays the adjustment of gender identity with the self-defined sex. In this interspace, the legal, life status of a transgender person is in vacuum. That prevents them from realization of fundamental human rights, since the changes after the medical treatments (interventions) are visible, especially in the transition phases, so regarding their appearance and other socially defined elements of identity they do not fit into the binary gender pattern. In this manner gender identity indisputably exposes transgender people to a multi-layered discrimination, isolation, social exclusion and violence in all the spheres of life.

Thus, a conclusion is imposed that the biggest problem in the gender identity adjustment procedure is conditioning by medical interventions, such as going through numerous medical examinations and procedures (psychiatric and endocrinological ones). Hence, it is necessary for the national regulations

to facilitate the procedure of the personal status change regarding the self-definition of gender identity, i.e. issuing of documents, or their change, in accordance with gender identity, without it being preconditioned by medical treatments, in a relatively short period of time. Therefore, it is crucial that, instead of partial amendments to certain laws, an umbrella law (*lex specialis*) be adopted, which would also regulate the protection of the rights of transgender people, and which would offer a fast, clear and transparent procedure for the legal recognition of gender identity, and regulate the rights of these people in the areas of work and employment, education, health insurance, marital and family life etc. We also consider that it is important that the hormone therapy be covered by compulsory health insurance, as well as providing a continuous availability of hormone therapy for trans* people by the state subsidizing the production of hormone therapy or issuing licenses for its import from abroad.

Expert psychological support to the families, especially children, concerning transgenderism, is crucial. Generally speaking, a better visibility of these people is necessary (through media also, but without sensationalistic reporting), as well as education of all the people whose professions are closely connected to dealing with transgender people, since ignorance, misapprehensions, fear from the unknown and prejudice towards diversity represent the grounds for stigmatization and discrimination, as it has been witnessed through history.

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