

Breach of Contract to Donate Bone Marrow

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Chapter 1: Introduction**

An acute legal dilemma arises in this case, involving two competing fundamental principles: On the one hand, democratic states grant individuals the right to refuse medical treatment for themselves. Section 2 of the **Basic Law: Human Dignity and Freedom** (1992) prohibits: “offense against the life or body of any person, or his dignity.”¹ Sect. 4 of the Law states: “Every person is entitled to defend his life, his body, and his dignity.” Seizing a person and compelling him to donate blood against his will is, apparently, unacceptable in a democratic state and would constitute a severe violation of personal autonomy. Such an act might be justified to defend a person against himself or those around him (*e.g.*, in a case of a mentally ill patient who endangers himself or those around him).² But it is difficult to approve of such an act simply to enforce an obligation to donate a bodily tissue or organ.

On the other hand, we have the supreme value of human life. The patient whose life depends on a donation has a right to life. The donor requires a simple needle to draw some blood. This does not violate his dignity.³ The patient’s life depends on the

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donation. Every individual’s life, including that of the patient in need of bone marrow transplantation, is of supreme value.⁴ This supreme value is embodied in the dictum of the Sages: “Lifesaving supersedes everything else in the Torah.”⁵

If we were to request the donor to donate, she would indeed be under no obligation. There would be no legal recourse to compel her to donate. But in our case the donor had already agreed to donate and the immune system of the patient had already been irreversibly suppressed on the basis of that agreement.

In such a case, does the law empower us to compel the donor to fulfill her agreement? Or does the law remain indifferent, impotent?

It seems that if we were dealing with a case where the procedure for extracting the bone marrow cells had already been accomplished and those cells had already been removed from the donor’s body, the donor’s refusal to allow those cells to be infused into the patient’s body would be rejected.

In this case, the patient’s claim is simple: the donor’s obligation should be enforced because only on its basis did he irreversibly alter his condition in the most drastic manner by suppressing his immune system. Further, if the donor’s bone marrow cells had already been collected, there would be no injury and no inconvenience to the donor in infusing those cells

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** This article is written in terms of Israeli civil law.

¹ **Basic Law of Human Dignity and Freedom** (1992).

² See Section 7 and 9 of the **Law for Treating Psychiatric Patients** (1991).

³ This cannot be compared to compulsory enemas for prisoners, for example. See Justice Barak, High Court Decision 79/355; N. Katlan, *Sheirut Battei ha-Sohar* 4:34(3), 294, 298-299 (1980): Every person in Israel has a basic right to the wholeness of his body and preservation of his human dignity. These rights are included in the

“Declaration of Juridical Rights” as mentioned in High Court Decision 77/112. See further Justice Frankfurter, *Rochin v. People of California* 342 regarding “conduct that shocks the conscience.” Therefore, the prison system must be able to point to a specific act of legislation empowering them to force an inmate to undergo an enema.

⁴ *Mishna, Sanhedrin* 4:5: “Therefore was man created singly, to teach you that anyone who destroys a single person is comparable to someone who destroys a whole world.”

⁵ In *halachic* terms the rule is: Lifesaving supersedes *Shabbat*. (*Yoma* 85:a). Lifesaving supersedes *Shabbat* even in cases of doubt. For further analysis see: A. Weinrot, *ha-Chayyim ba-halacha*, pp. 33-51.

into the body of the patient.⁶ A case like this does not involve such sublime values. In a case like this, nothing opposes the value of lifesaving and the obligation to fulfill legal contracts.

In our case, however, the donor's bone marrow cells had not yet been collected; the patient was hovering between life and death; and her immune system had already been suppressed. The question is of great moment. Some will conclude that it is inconceivable that a democratic state would require the police to restrain the donor to enable a physician to stick her with a needle to draw her blood. Life is indeed a supreme value. But a right cannot be seized by force, even if another's life is at stake.

In any event, there is a second possible perspective according to which autonomous will exists only until such time as a person chooses to enter a system of obligations (unless, of course, the contract is invalid). It is indeed clear that it is impossible to obligate the donation of bone marrow cells thereby requiring the donor to forgo even a moment of his free time. This is true even in a lifesaving situation.

However, the situation is very different when the donor has signed a contract to donate and even created a situation where the patient has incapacitated his immune system. Is it conceivable that we would free the donor from her obligation regardless of the fatal consequences? On the face of it, it would seem that the individual's autonomy cannot permit him to deceive anyone and certainly cannot permit him to breach a contract. It follows that if it is impossible to breach a financial contract, all the more so is it impossible to breach a contract where such breach would have fatal consequences.

The legal questions in this case are as follows:

1. Does a promise to donate bone marrow cells constitute a contract? Does this case fall under the rubric of contract law?

2. Assuming that there is a valid contract in this case, is it enforceable? Are the ramifications of breach only *ex post facto* in the realm of torts or can enforcement of the contract be enjoined? Can financial remuneration be offered to deter the donor from retracting? Does breach of the contract constitute a violation of criminal law?
3. It is apparently reasonable to expect that unjust behavior such as this will entail responsibility for the resulting death. This, however, is the question: Does the justice system have a means to enforce the contract, *i.e.*, to restrain the donor, stick her with a needle, and draw her blood? Assuming that the contract is valid, is it not clearly an example of a personal service contract? Is there anything more personal than sticking a needle into a person and drawing blood?

It would seem that Section 3(2) of the **Law of Contracts (Remedies for Breach of Contract)** applies here. According to this, there is no room for "enforcement of the contract requiring compulsion to do or receive personal labor or personal services." Is there any way around this?

Let us deal with these questions in order. Our purpose will be to establish whether the law in this case responds only *ex post facto*, creating a deterrent for future cases, or whether there exists a legal solution to save the patient's life.

Chapter 2: Does the promise to donate bone marrow cells constitute a contract?

Israeli courts have recognized the validity of a promise to marry.⁷ Yet such a promise is purely a matter of emotion. Justice Barak⁸ explained in this context:

"It is my opinion that the law cannot remain indifferent to an agreement to marry. The law need not leave such an agreement under the rubric of freedom of choice. The reasons for this are two: First, breach of a promise to marry is liable to lead to damage. There is no substantial justification to

⁶ In this context, see further: Ch. Ganz, "*ha-Ubbarim ha-mukpa'im shel ha-zug Nahmani*" *Iyyunei Mishpat* 18 (1993); A. Marmor, "*ha-Ubbarim ha-mukpa'im shel ha-zug Nahmani*" *ibid.* 19 (1995). See also *Roe v. Wads*, 410 U.S. 113(1073).

⁷ Civil Appeal 66/401. *John Doe v. John Doe*, Dec. 58(6) 209, 219 (2004).

⁸ *Ibid.*, p. 219.

deny financial compensation on such damage. Freedom to marry does not grant a right to cause damage to others. The promise to marry occasionally leads to various plans and their execution. The plan to marry is even liable to have consequences for other plans and might adversely affect the couple in various ways. Ignoring this life reality would be unjust.... Why should one side be freed from a promise that entails such results?"

Unlike a promise to marry, our case entails no damage to property. However, we do have before us an adverse impact that it would surely be proper to prevent. The law defends the interests of a person claiming that he or she forwent other possible unions pursuant to a promise to marry. All the more does this apply in a case where a person's life has been put in jeopardy on the basis of a promise.

Prof. N. Cohen distinguished⁹ various categories of contract – “perfect,” “shaky,” “void,” “invalid,” and “not judiciable”:

“Determining whether a contract is perfect and when it is shaky, void or invalid depends on a spectrum of reasons. The principle reason is rooted in the purpose of contract law. A contract is a social mechanism whose principle purpose is the creation and distribution of wealth... For this purpose, the law of contracts enlists the state's power of enforcement... Anything outside of their purview involves change, deliberation, and freedom. **Those areas where the law grants freedom of action or deliberation are inappropriate for contracts.** Other reasons decide the level of such contracts' validity. These reasons are rooted in the intentions of the parties to the contract **and the utility of the contract as compared to the damage it is likely to cause and background out of which it sprung.**”

There is no intimate, no emotional element in the decision to donate bone marrow cells. The persons involved are strangers to each other. But there clearly is an element of mutual obligation. The parties intend that the obligation be valid in light of the fact that on the basis of this obligation the patient enters a state of immunosuppression. Why should we not apply the laws of contracts in such a case?

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Consider another aspect of the matter, as the law is hostile to trade in organs.¹⁰ Sale of an organ is prohibited in section 3 of the **Law of Transplantation** (2008):¹¹

- (a) No one shall be compensated for an organ taken from his body or from the body of another person which is intended for transplantation...
- (b) No one shall give compensation for an organ that has been implanted in his body or in another person's body.

Further, the principle point rests in section 34 of the law, which states:

“The donor is entitled to retract his agreement to donate an organ at any time prior to the harvesting of the organ. The donor shall not bear any civil or criminal liability due to his retraction.”

However, here, we are not dealing with the sale of an organ. Rather, we are dealing with the donation of an organ. Further, in section 1 the law defines “organ” as including “an organ or part of a person or any tissue that can be transplanted, except blood, **bone marrow**, ova, and seminal cells.”¹²

It seems that the idea underlying this position is the distinction between “irreplaceable” organs and tissue cells, like blood, bone marrow, ova, and seminal cells, which continually replenish themselves. Donating these does not diminish the donor at all.

¹⁰ Jewish law strongly disapproves of any contract dealing with human organs, as those organs are not thought of as being a person's property. Organs cannot be sold or given as a gift. For a detailed discussion, see: Rabbi Sh. Y. Zevin, “*Mishpat Shylock le-fi ha-halacha*,” in his *Le-Or ha-halacha*, 403-425.

¹¹ **The Law of Transplantation** (2008), Isr. Code of Law 2144.

¹² Emphasis added by the author.

⁹ N. Cohen, “*ha-Heskem ha-Politi*,” *ha-Mishpat* 1 59, 63 (5753).

Donating these tissues constitutes an act of kindness (*chessed*) that in no way diminishes the body of the donor. It follows that there is no reason to deny the legality of the obligation to donate such tissues. Nor is there reason to block sanctioning a donor who violates his or her obligation.

In circumstances like these, we must consider whether the consent form signed by the donor might be categorized as a gift deed. In general, a gift is the transfer of ownership of property without consideration.¹³ Are bone marrow cells “property” in the **Law of Gifts**? Dr. Mordechai Rabello, in his book on the law of gifts,¹⁴ is of the opinion that human organs are indeed property. There is therefore no objection to a person giving an organ as a gift or obligating himself to give an organ as a gift as long as the gift of the organ does not endanger the life of the donor. For example, an obligation to donate blood, like an obligation to nurse a baby, or an obligation to donate hair is entirely legitimate.

In our case there is a written document, signed by the donor, stating that she is aware that the patient is undergoing immunosuppression on the basis of her willingness to donate bone marrow cells. In these circumstances, it is clear that the donor comprehends the significance of her position and its impact on the life of the patient even though the word “obligation” appears nowhere in the document.

In such circumstances, it is clear that the donor is aware that they are relying on her in a matter of life and death. A special responsibility therefore devolves upon the donor. The document signed by the donor consequently constitutes a written obligation to donate bone marrow cells as needed for the patient.¹⁵

Section 5b of the **Law of Gifts** states:

The change in the patient’s status was substantial, radical, and irreversible. The patient’s reliance on the donor’s obligation is absolute

“As long as the recipient of the gift does not change his status in reliance on the obligation of the donor, the donor has the right to retract his agreement unless he forwent that right in writing.”¹⁶

In our case, the patient did indeed change her status for the worse because of the obligation accepted by the donor. It follows that the donor is clearly not entitled to retract her agreement to donate.

Indeed, not every marginal or mild change in the recipient’s status will make the obligation to donate irreversible, denying the donor the right to retract. But in our case the change in the patient’s status is substantial, radical, and irreversible. The patient’s reliance on the donor’s obligation is absolute. The patient began the preparatory therapy for the donation not knowing that the donor would retract her agreement. Had she known, she would not have endangered her life by undergoing the treatment that, without the donation, would lead to certain death. There is no doubt that such a significant change in the patient’s status occurred in good faith. Therefore, the donor should be blocked from retracting her agreement.¹⁷

It seems therefore that we have a clear obligation here to go through with the gift. This obligation is in accord with all the requirements of Section 5 of the **Law of Gifts**. We are dealing with an obligation to alienate “property” without consideration. According to the rule, the **Law of Contracts** (General Part) and the **Law of Contracts** (Remedies for Breach of Contract) apply to gifts.¹⁸ It has been established, for example, in the Maximov case¹⁹ that **“in view of the law, a gift is a contract.”**

¹⁶ In this regard, see Civil Appeal 93/1483: The law protects the recipient of a gift. “It follows from Section 5b of the Law that if the recipient of the gift altered his condition or if the donor forewent in writing his right to withdraw the gift, then the obligation to give becomes irrevocable.”

¹⁷ According to the **Law of Gifts**, Sect 5c, “Aside from the exception mentioned in par. B, the giver is entitled to retract his obligation if such retraction is justified by misconduct on the part of the recipient toward the giver or toward any family member of the recipient or in a noticeable worsening of the health or financial status of the giver.”

In our case, however, none of this applies.

¹⁸ See Rabello, p. 31.

¹⁹ Civil Appeal 91/5187 and 80/495.

¹³ Sect. 1a of the **Law of Gifts** (1968); Isr. Code of Law 529.

¹⁴ M. Rabello, *Hoq ha-Mattana* (1968) 210.

¹⁵ **The Law of Gifts** does not require identifying the parties. Therefore, the fact that the agreement form does not mention the name of the patient in no way invalidates the obligation.

The conclusions to be drawn are therefore as follows:

- (a) It is possible to draw up a contract to obligate a donor to donate bone marrow.
- (b) The obligation to donate falls within the purview of the **Law of Gifts**. Therefore, the **Law of Contracts** applies to it.
- (c) It follows that contract law governs the relationship between the donor and the recipient in every respect.
- (d) To be precise, it is our position that the promise to donate is the basis of the contract. This position is rooted in the classic model of a contract based on mutual will. This is all the more correct when we consider the modern approach to contracts, according to which a contract is in force when we have before us the positions which lead to bona-fide, substantial, mutual reliance.
- (e) Having concluded that the contract is binding, it seems clear that if the donor retracts her agreement to donate, she has breached the contract by violating the conditions for retraction as set by the law.²⁰
- (f) It seems that there is no doubt that this contract would be enforced if the bone marrow cells had already been removed from the donor's body.

The only remaining problem in our case flows from the question whether the contract is enforceable when an invasive act, (*i.e.*, sticking the donor with a needle) would be required to harvest the bone marrow cells. However, there is no doubt that the **Law of Contracts** should apply and that the agreement to donate is valid and binding.

Chapter 3: The Criminal Aspect – Deterrence by Punishment

Having concluded that the obligation to donate bone marrow constitutes a valid and binding contract, it would seem possible to apply the criminal norm of punishment *ex post facto*. Such punishment would naturally constitute a sharp element of deterrence,

²⁰ In this matter, see, for example, the well-known approach of Prof. Atiyah in his *Essays on Contracts*, ch. 2.

which would be liable to prevent reoccurrence of such cases in the future.

According to Section 18 of the **Law of Punishment** (1977), any omission can constitute a crime as long as said omission is an act of “refraining from fulfilling a legal obligation **or contract**.” The text of the Law thus clearly refers to two principle sources of criminal liability: “legal obligation” and “contract.” Breach of contract is therefore a basis of normative obligation in all respects. It does not matter at all whether the omission be due violation of law or breach of contract.

Regarding the difficulty in using a criminal norm to enforce a contractual obligation, the Israeli courts have already denied recourse to this mode of enforcement. Although “every contract is by its very nature and essence of 'civil nature,' it can still lead to a source of obligation that, in its breach, might impose criminal liability... because aside from the behavioral

element all the other conditions necessary for criminal liability must be present... if the results of breach of contract

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are severe and criminally prohibited, if the values of society are to be protected by criminal law, and if the circumstances of the omission lend a criminal character to the omission, there would be no reason to require any specific, normative law in order to impose a criminal penalty.”²¹

Indeed, in our case the breach of contract constitutes a clear and blatant offense in terms of the value of life. The donor was aware of the fact that at the irreversible stage at which they found themselves, her refusal to continue the procedure after the patient's immune system had been suppressed would lead directly to the patient's death.

This is not a simple case of breach of contract bearing solely economic consequences. Misleading the patient and creating a situation where the patient underwent an irreversible procedure and then

²¹ Similarly: Criminal File (Jerusalem) 05/1056.

retracting the agreement to donate inevitably led to the patient's death. The donor's indifference to the patient's life is a severe offence against the defense of life demanded by the value of human life. There is no difference between this and a swimming instructor who abandons young pupils in a pool and leaves them to drown while ignoring their screams. In both these cases, the basis of obligation is contractual. But breach of the contract has in these cases fatal consequences. The legislation establishes that such omission constitutes homicide.

It therefore seems correct to apply the directives of Section 298 of the **Law of Punishment**:

“A person who causes or whose omission causes the death of another person shall be guilty of homicide, the punishment for which shall be twenty years of imprisonment.”

Having concluded that the **Law of Contracts** imposes an obligation to fulfill the donor's promise to the patient, it seems that if the donor wishes to retract her agreement she will be guilty of homicide because her omission violates her contractual obligation and will lead to the patient's death. The donor was aware of the severe results of her omission. The law therefore demands that she bear the consequences!

Therefore, it seems that legal policy ought to oblige us to seek a juristic solution that will serve as a normative source for enforcing an agreement to donate. Let us seek a normative source in the law of contracts that will enable the court to enforce the obligation to donate.

Chapter 4: The Intrinsic Aspect

We must return to basic principles. Contract law does not deal with autonomous will; rather, it provides a system of enforcement for the benefit of whichever party accepted the contractual obligation and is being misled by the other party.

We must therefore ask whether there is any justification on the intrinsic level for the state to

provide enforcement for the benefit of the patient. Should our sense of justice lead us to prefer the value of life over an offense against the autonomy of the individual, specifically in the case of a contract?

The question is of great importance both from the point of view of contract law, as we will see *infra*, and as a means to answer the normative question at the center of our case. This is because in certain cases the High Court has decided that it is possible to enforce an obligation on the basis of the legal concept known as “equity.”

In this context, it seems that a sense of justice requires enforcement of the obligation to donate bone marrow because of a quite simple reason: it is in the interests of the donor to be obligated to fulfill her word. It seems that at the moment the donor has been deterred from fulfilling her obligation. But viewed retrospectively, the donor herself would wholeheartedly thank whoever forced her to continue the

procedure, thereby saving her the need to live the rest of her life with the guilt for having brought about the patient's death.

Therefore, it seems that this is not a case of two conflicting interests. There is therefore no need to decide between conflicting interests. The internal and normative will of the donor

is such that she too will accept the enforcement of her agreement. This is indeed an unmistakably paternalistic proof. But it seems to rest on the feeling that every person naturally desires to be normative. Ignoring the donor's expressed opinions and deciding the case on the basis of pure, rational thought reflect the donor's best interests.

This is the path tread by the District Court in Jerusalem (Justice Tsvi Tal presiding) when it dealt with a minor donating bone marrow.²² The case involved a three-year old girl suffering from an incurable disease that would have led to her death within a short time. The only way to save her was to use her nine-year old sister's bone marrow. The court

²² TMA (Jerusalem) 82/26.

explained that the transplantation procedure is virtually without danger to the donor. But blocking the donation would hasten the patient's death.

The court was petitioned to approve of the physicians' request to remove bone marrow from the older sister (a minor) and infuse it into the younger sister's body. The court accepted the petition and decided that the girl's mother, acting as her natural guardian, is obligated to see to the minor's best interests, including therapeutic and health related matters.

It follows that since, in the absence of any treatment, the girl's death was certain and since the treatment provided hope for recovery with a reasonable risk factor, it appears that the treatment is for the benefit of the minor.

In every matter touching on the medical treatment of a minor the function of the court is to evaluate the mother's decisions and to determine if her decision would have been made by any "devoted parent." A parent who attempts to prevent certain death by a therapeutic procedure of doubtful outcome is certainly acting as a "devoted parent."

The problem of the minor donor is, however, more difficult.

It is clear that the agreement of a nine-year old girl cannot be considered valid. Such an agreement cannot be considered to have been made of the girl's own free will. And she certainly cannot be expected to understand the whole spectrum of data upon which such a decision must stand.

Therefore, any "donation" by her would have the status of being compelled. The court indicated that no one is obligated to save another from life threatening danger **unless he obligated himself** to do so.²³

²³ Since the passing of **Good Samaritan Law** (1998), Isr. Code of Law 1670. However, Israeli law is reluctant to impose punitive norms in cases of passivity where someone fails to act in accord with undefined values. See the High Court decision 93/119. The High Court explained that "even in lifesaving situations the law imposes a legal obligation with limitations narrower than the religious, moral law imposes."

Nonetheless, the court granted the petition for the benefit of the minor donor herself. They relied in this on the opinion of a psychologist who spoke with the minor and who thought that if she did not donate some of her bone marrow, she would always suffer from the feeling that she failed to do all she could to

save her sister's life. According to the psychologist, such a feeling would continually intensify as she matured.

Therefore, the court granted the petition **due to the benefit to the donor**. This benefit, although not of a physical nature, was of an emotional nature.²⁴

This rationale, equating the saving of the patient with the benefit of the donor so that her whole life will not be spent suffering pangs of conscience for failing to save her sister, served as the basis of a series of High Court decisions in the State of Massachusetts involving identical twins, one of which required a kidney transplantation from the other.²⁵

In effect, this ancient way of looking at things is reflected in *Tractate Baba Batra* 48a. There we find the concept of "physically pressuring a person until he expresses his agreement [to fulfill the decision of the court]."

Maimonides explains this as follows:²⁶

"When a man whom the law requires to be compelled to divorce his wife does not desire to divorce her, the court should have him beaten until he consents..."

Nonetheless, it seems that in our case the obligation to save the patient does not flow from the usual system of laws governing people in dire straits. In our case the donor created a situation in which the patient's life was endangered. Further, our donor explicitly obligated herself to save the patient. She cannot ignore the patient's life-threatening situation, as she herself was instrumental in causing it.

²⁴ See *Choshen Mishpat* 12:3.

²⁵ *Madsen vs. Harrison*, No. 68651 Eq. Mass. Sup. Jud. Ct. (1957); *Haskey vs. Harrison*, No. 68666 Eq. Mass. Sup. Jud. Ct. (1957); *Foster vs. Harrison*, No. 68674, Eq. Mass. Sup. Jud. Ct. (1957); William J. Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U.L.REV. 891 (1959); *Strunk v. Strunk*, 445 S.W. 2d. 145 (Ky. 1969).

²⁶ Mishna Torah, *Hil. Geirushin* 2:20.

Why is this *get* not void - for he is being compelled? Because one is regarded as compelled against one's will only when he is compelled and forced to do something that the Torah does not obligate him to do - e.g., a person who was beaten until he consented to a sale, or to give a present. If, however, a person's evil inclination pressed him to negate a mitzvah or to commit a transgression, and he was beaten until he performed the action he was obligated to perform, or he dissociated himself from the forbidden action, he is not considered as forced against his will. On the contrary, it is he himself who had forced his own conduct to become debased.

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And so, a person who refuses to divorce – since he wants to be part of the Jewish people, thus to perform all the mitzvot and eschew all the transgressions; it is only his evil inclination that presses him. Therefore, when he is beaten until his inclination has been weakened, his consent to divorce is his willful act."

This means that will does not derive from the mere words "I want." Instead, will flows from the assumption that a person wants to do what is normative and accepted in society. It follows that we can assume that after the fact the husband would agree that what was done does indeed reflect his objective benefit. This realization comes once he is free from the transient circumstances of the vortex of his emotions.

Maimonides explains that whenever an ethical obligation falls on a person, in his inner self he always wants to fulfill that obligation. This will flows from his desire to be accepted in his society and his desire to act in accord with normative, ethical imperatives. His will does not attain the status of volition in certain circumstances, as when his evil inclination clouds his consciousness causing a disconnection between his true will – which exists at

all times – and his volition. In this case physical force can be of use without offending his personal autonomy.²⁷

On the basis of this approach, it is possible to compel a person to accept medical therapy for his own benefit.²⁸ It must be equally possible to compel a person to fulfill an obligation to donate bone marrow as such compulsion in no way injures the donor.

We are speaking here about a wholly justifiable case where the donor will save the patient's life and even fulfill his own will. In these circumstances it seems certainly correct to say that there is commensurate injury to the donor's autonomy or the principles of justice and balance involving the interests favoring the enforcement of the said agreement.

Viewed from an essential point of view, the agreement is binding. The only question before us is whether there exists any normative source enabling the court to enforce the obligation.

The obligation to donate is essentially a contract to give a gift that apparently enables us to apply the **Law of Contracts** (Remedies for Breach of Contract). That law establishes enforcement as the main form of remedy.²⁹ Consequently, we apparently have here a clear normative source to enable the court to enforce the agreement by means of the various tools it has at its disposal.

However, remedies in the law of contracts apparently encounter a problem when applied in our case because Section 3(2) of the **Law of Contracts** (Remedies for Breach of Contract) rejects the right of

²⁷ In accord with this principle, we find that Jewish law "compels performance of *mitzvot*." This includes (*Y.D.* 245:2): "philanthropic contributions are collected, even by compulsion and even on Fridays." This means that the community can compel a member to aid others who are in need. Further, Jewish law distinguishes between compelling compliance with values as opposed to compelling compliance with obligations because in the latter case there is no offense against personal autonomy. See, for example, *Beit Chadash, ibid.*: "philanthropic contributions which have been pledged and are due on Friday may be collected by compulsion, unlike in cases where no pledge has been made." See further my articles in *Dinei Yisrael* 18:53 (5755-5756) and *Sinai* 128:72 (5761).

²⁸ See Sect. 15 of the **Law of Patients** (1996), *Isr. Code of Law* 1591

²⁹ This is the decision in the *Adres vs. Jones* case (1988, 41(1), 276-278): The offended party is entitled to enforcement. Although such enforcement is not commonly accepted, the legislature has spoken in this case and we must apply the law."

the offended party to enforcement if “enforcement of the contract requires compulsion to execute or to accept personal labor or personal services.” This is the final obstacle in our path. We shall discuss it *infra*, hopefully presenting a solution that would apply in our case.

Chapter 5: Personal Service Contracts

Prof. A. Yadin³⁰ explains that the law rejects the remedy of enforcement “in cases of labor that must be accomplished specifically by the party obligating himself, whether that party be a singer, artist, surgeon, construction worker, or production line worker...”

Our case thus constitutes a clear example of a personal service contract because the condition for donating the bone marrow rests in the personal compatibility between the immune system of the patient and this specific donor.

This is a donation that cannot be provided by anyone else since it requires absolute and complete compatibility between the two parties.

Indeed, we do not demand that the donor do anything. Others will do what needs to be done. She has only to stick out her arm. Then the health system will take over and provide whatever services are needed.

Nevertheless, in an appeal case (Nachmani), the High Court decided that transferring a test tube of fertilized ova would encounter the problem of enforcing a personal service contract. In that case as well, the donor was not required to do anything because he had already done what he needed to do. The rest of the procedure lay in the hands of the health system. Nevertheless, the High Court considered this to be a case of personal service because the result of the procedure would offend the autonomy of the donor.³¹

Further, the law does not care to impose any system of interpersonal relationships on persons. Such

compulsion is liable to impinge on personal freedom in a severe way.³²

In accord with all this, it apparently seems that taking the donor's arm and sticking a needle into it to draw blood clearly fulfills the rationale lying behind the law's rejection of enforcement in personal service contracts because there is nothing more personal than sticking a needle into a person's vein and taking his bone marrow. There is no greater offence against personal freedom. This offense against personal freedom is far more significant than singing at a wedding or painting a picture. How can such an agreement be enforced?

It seems that even if the contract constituted a clear gift, to which the laws of contracts would apply and for which breach of contract would lead to dramatic compensation corresponding

to the capital value of the damage, and even if we assume that a criminal violation tantamount to homicide has occurred, we still do not have before us a contract that the court can enforce as it is no more than a personal service contract.

Chapter 6: The Juristic Solution

Lord Denning introduced an important idea in the realm of contract law: Although contracts cannot be enforced unless they embody some consideration, *e.g.*, an obligation to reduce the amount of monthly rent, such contracts will nonetheless be enforced because the promising party is blocked from claiming the absence of consideration.

This is not due to the usual, well-recognized estoppel of English law. Rather, it is due to what Lord Denning called “promissory estoppel.” Principles of equity prevail here over positive law, leading the court to enforce an agreement despite said agreement being unenforceable in contract law.³³

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a contract that the court can enforce
as it is no more than a personal
service contract.***

³⁰ A. Yadin, *Hoq ha-Hozim*, 57.

³¹ Civil Appeal 93/5587, p. 516

³² See also J.D. Calamari and J.M. Perillo, *The Law of Contracts*, p. 667

³³ In Lord Denning's words in *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947): “In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a

This decision can inspire us to suggest a solution that can apparently be adopted even in our case as Israeli law also accepts the rule that any right granted by contract law to any one of the parties can be realized if and only if it arose in good faith.

Accordingly, it seems that we may find a proper normative solution to the ordinary block against enforcement as found in Section 3(2) of the **Law of Contracts** (Remedies for Breach of Contract). Indeed, this section grants the donor the right that his obligation not be enforced because it is merely a personal service contract.

However, the donor is also blocked from claiming this because his promise was not made in good faith. Rather, it was made in clearly and profoundly bad faith by a donor who deceived the patient and created a situation wherein the patient's immune system was destroyed. The obligation is clear and explicit and its breach is virtually criminal in nature, bordering on homicide.

In these circumstances, it is clear that we are dealing with a severe case of bad faith.

It therefore seems that just as Justice Denning determined in England that a promise creates an estoppel blocking any claim of absence of consideration,

similarly it would seem that absence of good faith on the part of the donor blocks her from the possibility of

It seems that in our case principles of justice require the State to enforce the contractual obligation in favor of the patient

insisting on her right to non-enforcement of the contract on the basis of Section 3(2) of the **Law of Contracts** (Remedies for Breach of Contract).

We have before us a clear contract obligating the donor to donate bone marrow to the patient. We have clarified above the principles of justice that in this

case require the enforcement of the contract. Proper policy requires the Court to order enforcement in this case.

The only reason to deny enforcement is the donor's right on the basis of Section 3(2) of the **Law of Contracts** (Remedies for Breach of Contract) to non-enforcement of personal service contracts. However, the good-faith principle enables us to overcome this obstacle. Like any other right based on the **Law of Contracts**, this right does not exist when we are dealing with a person acting in bad faith.

Chapter 7: Conclusion

The conclusion to be drawn from all this is "seek and you shall find." The laws of contracts are not only an expression of the individual's autonomy to formulate a contract as he wishes. These laws also establish the sovereign authority of the state to enforce the contract. Accordingly, it seems that in our case principles of justice require the State to enforce the contractual obligation in favor of the patient.

We have seen however that from the normative point of view there is room to say that fulfilling the obligation benefits the donor, not only the patient because by fulfilling her obligation the donor will not be forced to suffer pangs of conscience throughout her life for having brought about the death of another person. The technical obstacle in this context, on the basis of Section 3(2) of the **Law of Contracts** (Remedies for Breach of Contract), can be removed by use of the good-faith principle because this is a clear case of bad faith.

It seems that the proposed solution has an original aspect. But this should not stop us both because it supports a vital result from the point of view *lex desiderata* and because it is not very far reaching as it utilizes the common and accepted principle of good faith in order to overcome substantial rights as established in the **Law of Contracts**.

As a result we now have a legal basis for enforcing the contractual obligation and thereby saving the patient's life.

smaller sum in discharge of a larger sum, if acted upon, is **binding notwithstanding the absence of consideration**: and if the fusion of law and equity leads to this result so much the better. That aspect was not considered in *Foakes vs. Beer*. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect."