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# The Likely Evolution of the Israeli Supreme Court's Near-Certainty Test for Prior Restraint

## — New Doctrine or Semantic Shift?

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**Abstract**
In the 1953 Kol Ha'am case, the Israeli Supreme Court established a probability test for prior restraint. In the absence of a Hebrew word to distinguish *probable* and *possible*, Justice Shimon Agranat coined the term *vada'ut k'rova* (literally: 'near certainty') to define the English term *likely* in the Mandatory Press Ordinance, while emphasizing that *vada'ut k'rova* meant *probable*. Until the Court was again confronted by a prior-restraint case in the late 1970s, it had not relied upon Kol Ha'am for some sixteen years. In the interim, Agranat coined a new term for 'probable' – *mistaber* – which quickly replaced the term *vada'ut k'rova* in legal usage. However, the Court continued to employ the term *vada'ut k'rova* in applying the test established in Kol Ha'am. By 1988, it became clear that the Court was no longer applying the flexible probability test but a more rigid near-certainty test – in accordance with the literal meaning of the term *vada'ut k'rova* – although it never asserted or explained any doctrinal shift. This essay speculates that the change may have been an inadvertent consequence of retaining the original language of Kol Ha'am – despite the later adoption of the term *mistaber* – at a time when 'near certainty' may have been perceived as more consistent with the evolution of Israeli society's conception of the importance of freedom of expression.

**Keywords**
freedom of speech, freedom of the press, censorship, prior restraint, semantic shift

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"You keep using that word. I do not think it means what you think it means."
Inigo Montoya, *The Princess Bride*

## 1. Introduction

The 1953 Kol Ha'am case,[1] is a landmark in Israeli constitutional law. The judgment entrenched freedom of the press, paved the way for judicial review in the absence of a written constitution while granting quasi-constitutional status to Israel's Declaration of Independence,[2] and established the prevailing test for prior restraint. In his opinion in Kol Ha'am, Justice Shimon Agranat, an American-trained jurist,[3] seeking to define the term *likely*, established that the criterion for prior restraint was one of 'probability'. In the absence of a Hebrew word that distinguished between 'probable' and 'possible', Agranat coined a new Hebrew term – *vada'ut k'rova* or *karov l'vadai*.[4]

Since Kol Ha'am, the Israeli Supreme Court has regularly applied the "*vada'ut k'rova*" test in cases of prior restraint. In applying that test, the Court expressly relies upon Kol Ha'am. However, since its decision in the 1988 Schnitzer case, it has become clear that the Court was no longer applying a probability test, but rather a near-certainty test.

While apparently moving from a flexible probability test to a stricter near-certainty test, the Court never explained or acknowledged any deviation from Kol Ha'am. In this essay, I will propose a historical-linguistic explanation for the Supreme Court's reinterpretation of the probability test. I will begin by briefly summarizing the Kol Ha'am case, then establish that such a shift actually occurred, and proceed to review and explain the case-law and linguistic developments that may have led to the unacknowledged shift.

[1] HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of the Interior. References to this case will be to the page and line number in the Hebrew original published in Piskei Din (IsrSC), and to the page number of the English translation in Selected Judgments of the Supreme Court of Israel (IsrSJ).

[2] The Declaration of Independence was given supra-legal "constitutional" status in a 1994 amendment to Basic Law: Human Dignity and Liberty, which amended the Preamble to the Basic Law as follows: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." On the constitutional status of Israel's Basic Laws, see: CA 6821/93 United Mizrachi Bank v. Migdal Cooperative Village, 49(4) IsrSC 49(4) 221 (1995); 1995 IsrLR 2. Available at versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village; EA 92/03 Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset, 57(3) IsrSC 793 (2003). Available at versa.cardozo.yu.edu/opinions/mofaz-v-chairman-central-elections-committee-sixteenth-knesset; HCJ 212/03 Herut – The National Jewish Movement v. Justice Mishael Cheshin, Chairman of the Central Elections Committee for the Sixteenth Knesset, 57(1) IsrSC 750 (2003). Available at versa.cardozo.yu.edu/opinions/herut-national-jewish-movement-v-cheshin.

[3] J.D. (1929) University of Chicago Law School (Lahav, 1997: 29).

[4] The literal meaning of *vada'ut k'rova* is 'near certainty', while *karov l'vadai* literally means 'nearly certain'. In the decision, Agranat also employed the term *efsharut k'rova* (literally, 'near possibility') to mean 'probable'.

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The linguistic problem addressed in Kol Ha'am is indicative of a more general problem confronted by the fledgling State of Israel due to adopting Hebrew as an official language when it was still developing as a modern language,[5] and while the state's legal system was largely composed of laws originally drafted in English. This was partly addressed by retaining English as the determining language of laws drafted in English until such time as an official translation would be promulgated in the form of a New Version or a Consolidated Version,[6] and by retaining Art. 46 of the Palestine Order-in-Council 1922, which required recourse to English common law in certain circumstances.[7] While Art. 46 was sufficient to surmount various difficulties, including that of the possible incompatibility of mandatory legislation, originally drafted in large part for British colonies, with the regime and values of the nascent democracy as expressed, *inter alia*, in its declaration of independence, these measures were not adequate for addressing the problem of terminology that did not yet have adequate Hebrew equivalents, nor was it sufficient to prevent the inevitable problem of terminological inconsistency in a rapidly evolving language.[8]

[5] Thus, in 1933, American linguist Leonard Bloomfield wrote of Hebrew that "of late, there have been attempts to restore it, artificially, to the status of a spoken language" (Bloomfield, 1933: 66). An indication of the rate of linguistic change in legal terminology in the 23 years following Bloomfield's comment can be seen in Judge Yeshayahu Harel's revised 1959 translation of the Criminal Code Ordinance, 1936. The introduction notes the addition of 9 new Hebrew criminal-law terms adopted in the ten years since the previous edition. The footnotes note 73 differences between the language of the revised translation and the 1936 official translation. The footnotes also cite the original English wording of the ordinance 145 times for clarification of the translated text (Harel, 1959). The translation demonstrates the high rate of change in legal terminology at the time, as well as the fact that the Hebrew legal terminology available at the time was often inadequate to accurately express the sense of the source. The very need for such an annotated translation also reflects the problem of a legal community that was not sufficiently conversant in the language of the original text, and that therefore required a translation that noted where it did not precisely reflect the determinative source. The Criminal Code Ordinance was only replaced by a Hebrew law with the enactment of the Penal Law, 5737-1977. The challenge presented by the need "to adapt a classical Hebrew to the requirements of modern Hebrew expression" was also noted by Minister of Justice Dov Joseph in his preface to the first volume of Selected Judgments of the Supreme Court of Israel (1963).

[6] Sec. 16(7) of the Law and Administration Ordinance, 5708-1948, establishes that from the day of its promulgation in the Official Gazette, the language of a New Version or a Consolidated Version will be determinative, and that no argument can be raised as to any difference between the New Version or Consolidated Version and the original text of the law.

[7] Palestine Order in Council 1922: Available at content.ecf.org.il/files/M00929_PalestineOrderInCouncil1922English.pdf. Art. 46 was repealed by Foundations of Law, 5740-1980. On art. 46, see, e.g., Yadin, 1962.

[8] Examples of such inconsistency can be seen in Kol Ha'am itself, not only in Agranat's use of alternative Hebrew terms for *probable*, but also in the Agranat's use of the English term *press* in regard to freedom of the press, while the editor of the headnotes of the published judgment employed the Hebrew term *itonut*.

# 2. Kol Ha'am v. Minister of the Interior

## 2.1. Background

On May 22, 1953, the Israeli Minister of the Interior, exercising his authority under Sec. 19(2)(a) of the Press Ordinance 1933, ordered the suspension of publication of two communist newspapers – Kol Ha'am and Al Ittihad. The order was appealed to the Supreme Court sitting as High Court of Justice. The Court's judgment turned on the interpretation of the English phrase "likely to endanger the public peace" in the British Mandatory ordinance then in force.[9] Writing for the Court, Justice Agranat found that "we must interpret the term 'likely', when we read it together with the other matters stated in section 19(2)(a), in the sense of '*vada'ut k'rova*' (probability)" (884g; 105).[10]

In interpreting *likely* as expressing *vada'ut k'rova* in the sense of 'probability', Agranat intended to resolve a linguistic problem in establishing the appropriate criterion for prior restraint as 'probable'. At the time, Hebrew had an equivalent term for 'likely' – *alul* – which Agranat employed in translating the term, but it did not have a word in common usage that distinguished 'possible' from 'probable'.[11] Agranat resolved the problem by writing the word *probable* in English, and coining the term *karov l'vadai*, explaining: "*karov l'vadai* in the sense of probable". Agranat further added that the Shorter Oxford Dictionary (3rd ed. Vol. 2, p. 1589) defined *likely* as "seeming as if it would happen […] *probable* […] giving promise of success […] come near to or be […]" [emphasis original]. He then translated that definition into Hebrew, rendering the word *probable* as *karov l'vadai*, and clarified: "The expression 'probable' (*karov l'vadai*) is defined in the same dictionary as follows: '…that may reasonably be expected to happen…'" (887c; 108).[12]

The words *probable* and *probability* appear in English nine times in the opinion. Agranat repeatedly explained that by *karov l'vadai*, he meant 'probable', and where *karov l'vadai* or *vada'ut k'rova* appear without expressly stating that the term means 'probable', Agranat placed the words in quotation marks to indicate that he was using them as a term of art rather than in accordance with their literal meaning.

[9] The Press Ordinance 1933 was repealed by the Press Ordinance Repeal Law, 5777-2017.

[10] The English word *probability* is in parentheses in the original.

[11] The term *histabrut* would seem to have been adopted for probability in mathematics by the 1920s, and the term *hukei hahistbrut* ('the laws of probability') appeared in an article in the newspaper Hatzfira on Oct. 10, 1926, p. 2, but the term was not adopted in common use. Thus, in a memo dated Aug. 27, 1951, sent by the head of the Air Force training department to Air Force Commander General Haim Laskov on the subject of "Hebrew Terminology", the training department recommended using the word *efshari* for 'possibility', and adopting the recommendation of the Hebrew Language Academy to use the word *histabrut* for 'probability' (my thanks to Mr. Elon Gilad, language columnist for the Ha'aretz newspaper, for bringing these sources to my attention). In legal terminology, the word *efshari* – which could mean either 'possible' or 'probable' – was also used to translate *probable* in the Criminal Code Ordnance 1936. In Judge Yeshayahu Harel's 1959 edition of the Ordinance (*supra*, n. 6), a footnote was added to sec. 24 explaining that the term *efshari* was employed "in the sense of probable".

[12] Agranat wrote *probable* in English and added *karov l'vadai* in parentheses.

## 2.2. Did Kol Ha'am Require Probability to the Degree of Near-Certainty?

Arguably, had Agranat intended to establish a near-certainty test, he would not have needed to coin a word to distinguish between 'possible' and 'probable', there would have been no need to explain that by *karov l'vadai* he meant 'probable' inasmuch as 'near certainty' is the literal meaning of *karov l'vadai*, and there would have been no need for Agranat to repeatedly set the terms *karov l'vadai* and *vada'ut k'rova* in quotation marks if his intention was to employ those words in their plain meaning.

Nevertheless, it might be argued that in two instances in his opinion, Agranat argues for a more stringent test than probability, and that his intention was to establish a criterion of near certainty.

At one point (887e; 108), Agranat emphasizes the word *karov* ('near') in the term *karov l'vadai* without placing the term in quotes and without the addition of the word *probable* in parenthesis. However, this would not appear to indicate that Agranat intended to establish a criterion of near certainty, or that he sought to deviate from the meaning of the term *karov l'vadai* as 'probable', which he had just defined in the immediately preceding paragraph, and had set in quotation marks in the immediately preceding sentence. Rather, Agranat emphasized the word *karov* in explaining:

> In other words: is it not to be understood from those definitions, that it is not absolute certainty with regard to the occurrence of the result that the legislator desired to prevent that constitutes the condition for applying the said power, but that, on the other hand, the disclosure of a bare tendency in that direction in the matter published is, in its turn, insufficient for that purpose; that, in fact, the standard in question is a kind of 'golden mean' between the other two possibilities, namely that it is ***karov*** *l'vadai* that that is what will happen as the result of the improper publication?

It would seem that in emphasizing the word *karov*, Agranat was not changing the meaning of the term he had just coined for 'probable', but rather emphasized that the probability test that he had established was the middle ground between certainty and bare tendency. That middle ground is not 'near certainty', which arguably would be the middle ground between 'probable' and 'certain', but rather 'probability'.

Later in his opinion, Agranat again employed the term *krova l'vadai* twice in one paragraph without quotation marks and without adding the word *probable* (890e-f (para. 4); 102). There, Agranat first states: "the consideration that, as a consequence of the publication, an imminent danger has been created to the public peace strengthens the estimation that that danger is *krova l'vadai*", and states further on: "But if the Minister of Interior becomes aware, in the light of circumstances, that the publication makes it possible, amounting almost to a certainty […]".

Here, again, it should be noted that this appears immediately after Agranat states:

> The test of '*vada'ut k'rova*' which we favour does not mean that the Minister of Interior must be satisfied in every case that the danger to the public peace is likely [*alula*] to occur shortly after the matters are published in the newspaper in question. A finding of *probability* [printed in English, emphasis added –

> A.S.] does not necessarily mean a finding of proximity of the danger, in the sense of *proximity* [printed in English, emphasis added – A.S.] in time."

In other words, in further explaining the meaning of probability, Agranat was not deviating from the meaning of the term that he defines as *probability* in the same paragraph.

Moreover, in order to conclude that Agranat intended to establish a test that required a degree of probability amounting to near certainty, one would expect to find that the *ratio decidendi* for granting the petitions was that while the offensive publications presented a probable threat, that threat did not amount to a near certainty or, at the very least, a very high degree of probability. However, the petitions were granted because Agranat found that, in both cases, the Minister had applied the criterion of "bad tendency", and in the case of Al Ittihad, that despite the tone of the offensive material, it presented no degree of threat whatsoever. Thus, the holding does not support an interpretation of *vada'ut k'rova* as 'near certainty'. While Agranat's robust defense of freedom of the press can certainly be understood as supporting a high threshold for prior restraint, the *ratio decidendi* of the case holds no more than that a bad tendency does not amount to a probable threat.[13]

It is also important to bear in mind that, as earlier noted, in coining the term *vada'ut k'rova*, Agranat was not merely providing a translation or clarification of the term *likely* in order to resolve a purely linguistic issue. Agranat translated the word *likely* as *alul* (887a; 108).[14] *Probable* was not a translation of the term *likely*, but rather a purposive legal interpretation of the degree of threat indicated by the term *likely* in view of Agranat's opinion that the meaning of the term *likely* as construed in English common law was incompatible with the values of a modern democracy. Thus, when Agranat follows the term *vada'ut k'rova* with the word *probability* in parentheses, he is not clarifying what *likely* means in common usage or in the common law, but rather is establishing a new criterion. In order for an action to be deemed "likely to endanger the public peace", the Minister must determine that the threat is probable.

The holding of Kol Ha'am was succinctly summed up in the 1962 Levi Geri case[15] as follows:

[13] It should however be noted that although the ratio is that prior restraint requires a finding of a probable threat to public peace, Agranat expressed the opinion that when the threat is not *immediate*, and not *certain*, prior restraint should be weighed against the possible chilling effect upon freedom of expression (892a-d; 114). Note that the English translation "in cases in which there exists no danger of causing *immediate*, or even *probable*, harm to the public peace" is inaccurate. Agranat did not refer here to 'probable' (*karov l'vadai*) harm but to 'certain' (*vadai*) harm.

[14] It is interesting to note that the word *alul* has undergone a similar process of differentiation as that proposed here for *karov l'vadai*. Originally, *alul* was a neutral term that simply meant 'likely'. However, the adoption of the synonym *asui* to refer to a likely positive outcome, has led to the current usage of *alul* solely to express a likely negative outcome. On *asui* and *alul*, see: *Asui v'alul* on The Hebrew Language Academy website: tinyurl.com/39v9jfpu.

[15] This was the first case in which Kol Ha'am was explicitly applied as precedent. The case is of particular importance in that the Court chose not to limit the application of Kol Ha'am to cases that involved the word *likely* in the relevant statute, and because it extended the holding of Kol Ha'am to apply not only to freedom of the press, but to freedom of expression in general.

> There the rule was laid down that in order to avoid any danger to the public peace one must apply the test whether there exists a "probability" [*vada'ut k'rova*] that the publication will endanger the public peace [2418e].[16]

Lastly, although a translation is not conclusive evidence, it is worth noting that the term *near certainty* does not appear in the English translation of the case as published in Selected Judgments of the Supreme Court of Israel, which was published in 1963, prior to Agranat's coining the term *mistaber* for 'probable'. It would seem that, at the time, it was clear to the translator of the case and to the editor of that volume, Supreme Court Justice E. David Goitein, that *karov l'vadai* and *vada'ut k'rova* meant 'probable' and 'probability' and nothing more.

In conclusion, the test that Agranat established was that of "*karov l'vadai* in the sense of probable", and by *probable* Agranat meant probable in the sense of "that may reasonably be expected to happen".

Following Levi Geri, in December 1962, Kol Ha'am, was found to be inapplicable to the facts of the case in Dissenchick[17] in February 1963. Kol Ha'am was not expressly relied upon again by the Court until 1978. Kol Ha'am was mentioned in passing in a few cases, but the probability test was neither mentioned nor applied in grounding the Court's reasoning in any case.[18]

## 3. A New Term for Probable

The drawback of Agranat's new term *karov l'vadai* was that the literal meaning of the words is 'nearly certain'. In 1967, President Agranat addressed that ambiguity by proposing a new term for probable – *mistaber*[19] – in Dahan and Ben Haroush. This case did not concern prior restraint or freedom of expression, but rather "offences committed in prosecution of a common purpose" under sec. 24 of the Criminal Code Ordinance 1936. At the time, the section read as follows (in the original, binding English text):

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose any offence or offences is or are committed of such nature that the commission is a *probable* consequence of the prosecution of such purpose, each of such persons being present at the commission of any such offenses is deemed to have committed the offence or offences committed [emphasis added, A.S.].

[16] The term *vada'ut k'rova* is in quotation marks in the original.

[17] In this case, the appellants argued for the application of the Kol Ha'am probability test in an appeal of a conviction for contempt of court. The Court rejected the argument.

[18] Barak, 1989: 374, and see Shinar, 2021: 5, and see the dissenting opinion of Justice H. Cohn in EA 1/65 Yaakov Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset, IsrSC 19(3) 365 (1964). Available at versa.cardozo.yu.edu/opinions/yeredor-v-chairman-central-elections-committee-sixth-knesset.

[19] Supra, n.11.

The Hebrew version of sec. 24 employed the term *efshari* for *probable*, but *efshari* could also be understood as 'possible'. In addressing the meaning of the term *probable consequence*, Agranat proposed a new term for distinguishing between 'possible' and 'probable' – *mistaber* – thus rendering *probable consequence* as *totza'a mistaberet*, adding, "*totza'a mistaberet*, or if you prefer, *tzfiut s'vira*" ('probable result, or if you prefer, reasonable expectation').[20] The new term was quickly adopted by the Court, and later replaced the term *efshari* in the official Hebrew version of sec. 24 in the Penal Law, 5737-1977 (renumbered as sec. 28).

Of course, it may reasonably be argued that because Dahan and Ben Haroush was a criminal case and, therefore, concerned different values and principles than those involved in freedom of expression and prior restraint, the term coined by Agranat in that case does not reflect the same concept as that in Kol Ha'am. However, there has been some blurring of the conceptual borders in the Court's case law in this regard.

## 3.1. Expanding the Application of the Term *Mistaber* and Blurring the Borders

The case of Borochov v. Yefet concerned a private criminal complaint for defamation under the Defamation Law, 5725-1965,[21] against journalist Ze'ev Yefet. In that case, we find the following quote:

> And if the publisher is aware of his conduct and the circumstances that constitute the publication of defamation, then he is necessarily aware of the nearly certain [*k'rova l'vadai*], expected harm, even if he does not desire it. In other words, it may be assumed that one who has *mens rea* in all that regards the publication of defamation, i.e.: awareness of the conduct and the circumstances of the offense, may be deemed, in most cases, as one who foresaw the harm (even if he did not intend it) to a *high degree of probability* [*histabrut*]. [emphasis added, A.S.][22]

As we see, both the term coined in Kol Ha'am and the term coined in Dahan and Ben Haroush are employed here in a case of defamation. However, the use of the term *k'rova l'vadai* is somewhat confusing here.[23] Both Kol Ha'am and Borochov addressed the issue

[20] Note that *mistaber* and *mistaberet* are the masculine and feminine of the reflexive form of the root s-v-r. *S'vira* is the feminine for of *savir* (reasonable, logical), which also derives from the root s-v-r. The use of s-v-r in the sense of 'probable' finds its origin in the Talmudic Aramaic term *s'vara*, meaning 'reason', or a reasonable or logical argument.

[21] Sec. 8 of the Defamation Law, 5725-1965, permits a plaintiff to file a private criminal complaint, in addition to the tort under sec. 7.

[22] At p. 213, per Justice E. Goldberg. I have translated the term *karov l'vadai* as *nearly certain* rather than *probable* because Goldberg J. is explicitly referring to S. Z. Feller's definition of *dolus indirectus*: "When the actor foresees, to a nearly certain [*k'rova l'vadai*] level of probability, that his conduct is likely to lead to the result on which the completion of the offense is contingent […]" (Feller, 1984: 593). I would further note that Justice Barak cites Kol Ha'am in his concurrence (218), although not on point.

[23] Of course, employing the same term differently in different legal contexts, although occasionally confusing, is not uncommon, e.g., *negligence* in tort and criminal law, *proportionality* in jus ad bellum and jus in bello, *conversion* in tort and equity, or *infant* and *result* in their plain and legal meanings.

of the foreseeability of harm to a protected interest as the result of a newspaper publication. However, Kol Ha'am concerned the likelihood of the realization of predicted harm, whereas Borochov concerned the degree of foreseeability required to impute criminal intent to cause a harmful result that was actually realized. In Borochov, Justice E. Golberg correctly employed the term *vada'ut k'rova* in its plain meaning in regard to the level of foreseeability required for a presumption of criminal intent. However, because this case on criminal defamation concerned freedom of expression and freedom of the press, it is perhaps not surprising that it was later relied upon by the Court in two leading cases concerning censorship: HCJ 806/88 Universal City Studios v. Films and Plays Censorship Board, and HCJ 4804/94 Station Film Co. v. The Film Review Board. Both cases also make explicit reference to Kol Ha'am and to 'probability' (*histabrut*). In Universal City Studios, President A. Barak writes:

> In the light of my conclusion concerning the nature of the damage, I do not need to examine the question of the probability [*histabrut*] of its occurrence. According to the precedents on this subject the test of probability [*mivhan hahistabrut*] to be applied in matters concerning the powers of the censor is that of near certainty [*vada'ut k'rova*].

In Station Film Co., President A. Barak writes:

> One formulation of the freedom of expression in Israel was conceived by Justice Agranat in *Kol Ha'Am*. This formula examines the proper balance between freedom of expression and public peace. It provides that, in such a clash, freedom of expression may be impaired if the following two conditions are satisfied. First, the harm that the expression causes to the public peace must be serious, grave and severe. The harm must exceed the "level of tolerance" acceptable in a democratic society and shake that society to its very foundations. Second, the *probability* of such an injury to public peace occurring must be *nearly certain*. *It is insufficient that the harm be only possible or probable.* [emphasis added, A.S.]

Perhaps most striking is the Court's use of Kol Ha'am and the term Agranat coined for 'probable' in Dahan and Ben Haroush in appeals of decisions of the Central Elections Committee to bar party lists or candidates from participating in Knesset elections.

When the issue arose in the 1984 Neiman case,[24] Kol Ha'am was invoked by Justice A. Barak, writing:

> Thus, for example, where the conflicting interests were state security and the freedom of expression, the Supreme Court adopted the test of "near certainty" [*karov l'vadai*] danger, while rejecting the known American formula of a "clear and present danger" (HCJ 73/53 [*Kol Ha'am*]). The same "near certainty" [*vada'ut k'rova*] test was applied with regard to a conflict between the principle of the public peace and that of the freedom of demonstration, worship and information (HCJ 243/82 [*Zichroni v. Broadcast Authority*]). However, where the conflict was between the principle of free speech and that of judicial integrity, the Court used the standard of a "reasonable possibility" [*efsharut k'rova*] (CrimA 696/81 [*Azoulai v. State of Israel*]), following CrimA 126/62 [*Dissenchick v. Attorney General*]. Indeed, when adopting the standard of probability [*histabrut*], one should not follow a general, universal criterion, since it depends

[24] Note that in the English translation the term *karov l'vadai* appears as *probable.* I have translated it as *near certainty* in view of how Barak P. has employed the term in other cases, as well as in articles he published in English.

> on the force of the different values that come into conflict within a given legal context (HCJ 153/83 [*Levi v. Commander of the Southern District of the Israeli Police*] at 403).[25]

Thus, we find Barak employing two synonymous terms that Agranat employed for 'probable' in Kol Ha'am (*vada'ut k'rova* and *efsharut k'rova*), as well as the term he coined for 'probable' in Dahan and Ben Haroush (*histabrut*) to describe the test that Agranat established in Kol Ha'am, while distinguishing among them.[26]

As we see, the term that Agranat coined for 'probable' (*mistaber*) in Dahan and Ben Haroush came to be used in that sense not only in the criminal context, but also in cases involving freedom of expression, freedom of political speech, freedom of the press, and the right to be elected, while his original term for 'probable' (*karov l'vadai*) came to be understood to mean something more than 'probable' – 'nearly certain'.

While we might have expected that with the adoption of a new, unambiguous Hebrew term for 'probable', the probability test – the "*vada'ut k'rova*" test – would have been renamed the "*histabrut*" test, as indeed it came to be known in election appeals cases. Instead, the synonymous terms were understood to indicate different levels of probability and different tests.

## 3.2. The Transformation of Probable to Nearly Certain

As we have seen, beginning in the late 1970s, the Court addressed a number of cases in which it discussed or applied the Kol Ha'am test.[27] In doing so, the Court continued to refer to the test as the *vada'ut k'rova* test, as it had been referred to consistently since it was established in Kol Ha'am. In the 1987 Laor case, the Court reiterated its position that the test applicable and consistently applied in cases of prior restraint was the *vada'ut k'rova* test established in Kol Ha'am. What went unnoticed was a remark in the dissenting opinion of Maltz J: "I do not know exactly how '*vada'ut k'rova*' is measured, and where

[25] Para. 7 (p. 310) of the opinion of Barak J.

[26] The Court has revisited the issue of whether what it terms 'the probability test' (*hamivhan hahistabruti*) is applicable to the disqualification of lists or candidates under what is now sec. 7A of Basic Law: The Knesset on a number of occasions but has yet to decide the issue. See: EA 1/88 Moshe Neiman v. Chairman of the Central Elections Committee for the 12th Knesset, IsrSC 42(4), 177 (1988). Available at versa.cardozo.yu.edu/opinions/kach-v-central-election-committee-twelfth-knesset; EA 2/88 Ben Shalom v. Central Elections Committee for the 12th Knesset, IsrSC 43(4) 221 (1989); EDA 11280/02 Central Elections Committee for the Sixteenth Knesset v. MK Ahmad Tibi, IsrSC 57 (4) 1 (2003); EA 561/09 Balad – National Democratic Alliance v. Central Elections Committee for the 18th Knesset (Jan. 21, 2009); EDA 9255/12 Central Election Committee for the 19th Knesset v. MK Hanin Zoabi (Feb. 18, 2015); EDA 1095/15 Central Election Committee for the 20th Knesset v. Hanin Zoabi, (Dec. 10, 2015); EA 1806/19 Central Elections Committee for the 21st Knesset v. Dr. Ofer Cassif (July 7, 2019).

[27] E.g., HCJ 807/78 Ein Gal v. Films and Plays Review Board,33(1) IsrSC 274; HCJ. 243/81 Yaki Yosha Co. Ltd. v. Films and Theater Review Board, 35(3) IsrSC 421; CrimA 677/83 Borochov v. Yefet, 39(3) IsrSC 205; HCJ 562/86 El Hatib v. Jerusalem District Commissioner,40(3) IsrSC 657; HCJ 806/88 Universal City Studios v. Film and Theater Review Board, 43(2) IsrSC 22. Available at versa.cardozo.yu.edu/opinions/universal-city-studios-v-films-and-plays-censorship-board; HCJ 4804/94 Station Film Co. v. Film and Theater Review Board, 50(5) IsrSC 661. Available at versa.cardozo.yu.edu/opinions/station-film-co-v-film-review-board; HCJ 6126/94 Szenes v. Broadcasting Authority, 53(3) IsrSC 817. Available at versa.cardozo.yu.edu/opinions/szenes-v-broadcasting-authority.

the borderline is between it and *vada'ut* that is not *k'rova*…". The juxtaposition of *vada'ut k'rova* and *vada'ut that is not k'rova* can only be understood as comparing 'near certainty' to 'certainty that is not near' inasmuch as the word *vada'ut* in isolation cannot be understood in the sense of 'probable', but only in the sense of 'certain'. Thus, from the juxtaposition of *vada'ut k'rova* and *vada'ut that is not k'rova*, it is clear that Justice Maltz was no longer employing the term *vada'ut k'rova* in its original sense of 'probable'.

Similarly, as we saw above in the 1983 case of Borochov v. Yefet, the term *vada'ut k'rova* was used in the sense of 'near certainty' to describe the degree of the probability of a result that is required for a presumption of criminal intent.

The 1989 judgment in the Schnitzer case presented the clearest indication that the Court was employing 'near certainty' as the test for prior restraint. In doing so, the Court did not note any doctrinal change. In Schnitzer, the Court was again faced with interpreting the English term *likely*, but this time in regard to military censorship under the Defence (Emergency) Regulations 1945. The Court turned to Kol Ha'am. Writing for the Court, Justice Barak explained:

> There is no substantive difference between "military" censorship and "civil" censorship, and the same weight should be given to state security, on the one hand, and freedom of expression, on the other, in both. […] It is true that the dangers to security which the Defence Regulations seek to prevent may sometimes – but not always – be more severe than the danger to the public order which other laws seek to prevent. This relative difference will be expressed in the fact that it will be easier to show that the danger of injury to state security is substantial and severe and that *the probability of its occurrence is nearly certain* […] [emphasis added, A.S.].[28]

Here, again, the context requires the conclusion that 'nearly certain' is the correct understanding of the term *karov l'vadai* and that the term cannot be understood in the sense of 'probable' as intended by Agranat in Kol Ha'am. In the phrase "the probability of its occurrence is nearly certain", Barak employs both of the terms coined by Agranat for *probable – histabrut* and *karov l'vadai*. If both are understood in the sense of 'probable', the Hebrew phrase would translate as the redundant "the probability of its occurrence is probable". Moreover, in commenting on his opinion in the Schnitzer case, Barak later wrote as follows in English:

> We held that the military censor may prevent publication only if the uncensored publication would create a near certainty of grave harm to state security, public security, or public peace (Barak, 2006: 6).

[28] Para. 16 of the opinion of Barak J.

## 3.3. Further Confusion of the Terminology

In commenting on *Schnitzer*, Zaharah Markoe wrote:

> The court's decision in *Schnitzer* did not depart from the line of reasoning set forth in *Kol Ha'Am*, rather, the standard expressed seems to shift the court's standard in *Kol Ha'Am* from a "proximity" test to a "near certainty" test (Markoe 2000: 332).

It would appear that Markoe does not see 'near certainty' as a deviation from the holding in Kol Ha'am, but does sense a "shift in the court's standard". However, the nature of that shift is not clear inasmuch as in establishing the probability test in Kol Ha'am, Agranat specifically rejected proximity. This approach appears to reflect the lack of clarity in regard to the probability test that was noted by Kremnitzer and Ghanayim (2002: 53): "Some judges and scholars do not adequately understand the probability test and tend to blur the distinction between this test and that of 'clear and present (immediate) danger'".

The confusion in the use of the various terms for probability became even clearer in the Further Hearing in Kahane, in which the Court focused upon the question whether the probability (*histabrut*) test applied to the offence of incitement to racism. Having established that the test applied, Justice Orr addressed the issue of the degree of probability required, and made the following statement:

> The framework of doubt is as to the question whether to adopt the stringent test of "near certainty" [*vada'ut k'rova*] in our case or the more lenient test of the reasonable or actual possibility [*efsharut s'vira o mamashit*]. The ideological foundation for the application of the test of near certainty was laid by Justice Agranat in the *Kol Ha'am* case.[29]

Justice Orr asserts that the *vada'ut k'rova* test established by Agranat in Kol Ha'am not only established the probability test, but something more, i.e., 'near certainty'. In his view, *vada'ut k'rova* is more strict than a reasonable possibility. The statement reveals two things. First, Orr understands *vada'ut k'rova* in Kol Ha'am as meaning 'nearly certain' as opposed to 'probable'. Second, it would seem (with all due respect) that Orr J. may not have considered the opinion of Agranat in Dahan and Ben Haroush, in which Agranat changed the term for *probable* from *karov l'vadai* to *mistaber* and explained that *totza'a mistaberet* ('probable consequence') was equivalent to *tzfiut s'vira* ('reasonable expectation'). In other words, according to Agranat, the terms *karov l'vadai* ('nearly certain in the sense of probable'), *mistaber* ('probable'), and *totza'a s'vira* ('reasonable consequence') are synonyms for *probable* in the sense of what may reasonably be expected to happen. Orr saw the term that Agranat originally coined for *probable* as more strict than the terms Agranat later employed as synonyms for *probable*. Orr thus employs the term coined for *probable* in Kol Ha'am as a stricter test than the one originally established in that case, while purporting to apply the original test.

[29] Para. 31 of the opinion of Orr J.

The Court's understanding of Justice Agranat's term for *probable* as meaning 'near certainty' is also apparent in the opinion of Barak D.P. in the Dayan case. Barak writes:

> It follows from this equality that it is insufficient for there to be a near certainty of a substantial violation of one right in order to deny the other right. Even if it is proved that it is definitely certain that the freedom of assembly, demonstration or picketing will intrude on privacy, this is insufficient to justify denying that freedom. Similarly, even were it proven that it was definitely certain that the full exercise of the right to privacy would violate the right of assembly, procession or picket, denying the right to privacy would still not be justified. Indeed, we are not dealing with a "vertical balance" which looks for formulae of reasonable likelihood. [30]

Clearly, Barak understands the term coined by Agranat for *probable* in its literal sense of 'nearly certain'. Thus, he can juxtapose 'near' certainty with 'definite' certainty and with *reasonable likelihood*, i.e., 'probability'.

Similarly, in Adalah, Justice Procaccia writes of "a certainty [*vada'ut*] or almost certain probability [*histabrut k'rova l'vada'it*]", thus revealing that she, too, understands Justice Agranat's term for *probable* in its literal sense of 'nearly certain', and joins Agranat's synonyms for *probable* in the phrase "almost certain probability".[31]

Perhaps most strikingly, in his 2002 Harvard Law Review article, *A Judge on Judging*, former Supreme Court President Aharon Barak writes in English (Barak, Foreword: 94 fn. 288):

> For example, a statute originating from the time when Israel was under British mandatory rule provides that the High Commissioner – today, the Minister of Interior – may close a newspaper if, in his discretion, "any matter appearing in a newspaper is … likely to endanger the public peace." Press Ordinance, 1933, § 19(2)(a). In interpreting the word "likely", the Israeli Supreme Court has balanced the right to freedom of speech with the interest in public peace, holding that "likely to endanger the public peace" means there is near certainty that the publication will indeed harm the public peace. See H.C. 73/53, "Kol HaAm" Co. v. Minister of Interior, 7 P.D. 871.

More recently, in reviewing the development of freedom of speech in Israel, Adam Shinar described the holding in Kol Ha'am as follows in a book edited, *inter alia*, by Aharon Barak (Shinar 2021: 5):

> Lacking the power of judicial review over primary legislation, the Court instead narrowly interpreted the term "likely to endanger the public peace", holding that likely is not merely a "bad tendency" to endanger public peace, but a more exacting standard of "near certainty". Only if the speech is almost certain to endanger the public peace then the Minister can exercise his authority to shut down the newspaper.

Of course, that is not what Agranat held in Kol Ha'am. Agranat wrote:

> Thus, here we have a first sign indicating that we must interpret the term "likely", when we read it together with the other matters stated in section 19(2)(a), in the sense of "*vada'ut k'rova*" (probability) rather than in the spirit of the view which favors the doctrine of the "bad tendency" and "indirect causation" (884g; 105).[32]

[30] Para. 28.

[31] Para. 8 of the opinion of Procaccia J.

[32] The word *probability* appears in English in parentheses in the original.

While other examples can be adduced, the above should suffice to show that the Court indeed transformed the probability test into the near-certainty test, while asserting that it was continuing to rely upon Kol Ha'am.

## 3.4. Probable as Opposed to Nearly Certain

The Court has never explained nor even expressly acknowledged a change in the test established in Kol Ha'am and continues to invoke that historical precedent when applying its new test. Several scholars have addressed the near-certainty test and speculated as to the reason for its adoption, but in discussing Kol Ha'am and its later application, they do not consider any possible difference between what was actually held and what is now assumed to be the holding.

For example, in an article discussing the expansion of the application of Kol Ha'am beyond the issue of freedom of the press to all cases in which a conflict arises between freedom of expression and public peace, Avner Barak writes:

> In later case law of the Supreme Court, the near-certainty formula was adopted, primarily because the judges were of the opinion that freedom of expression should be given great weight, and it was therefore preferable to adhere to a formula by which only probability to a high degree of certainty could infringe the principle of freedom of expression (Barak, 1989: 386 (Hebrew)).

The author's point is not that the test changed, but rather that its application was broadened. His assumption is that the test in Kol Ha'am was that of near-certainty, and his argument is that among the many possible tests that might be applied in a clash of interests, the near-certainty test may be the best and should be applied consistently (Barak, 1989: 406).

As opposed to this**,** Kremnitzer and Ghanayim (2002: 53) address the problematic nature of adopting near certainty as a test for probability, writing:

> There is a lack of clarity concerning the meaning of the term "probability". Is it sufficient that the possibility of such a breach is more likely than not, or must the probability of violation be of a higher degree, where only a miracle can prevent the violation from occurring? If we adopt the second approach (which is more consistent with the term "near certainty" – which is the literal meaning of the Hebrew term used to denote the probability test – but less consistent with the concept of probability) and correctly apply it, then it would be almost impossible to restrict freedom of expression.

While the authors address the difficulty in assessing probability, they do not suggest that the Court changed its approach from 'probability' to 'near certainty'. Thus, they state that Kol Ha'am "emphasized that freedom of expression would retreat […] only when the likelihood of a breach of the public peace was *almost definite* in the sense of being 'probable'" (Kremnitzer & Ghanayim, 2002: 52), speak of "a lack of clarity concerning the meaning", and refer to the "determination of '*near certainty*' in the sense of 'probability' […]" [emphasis added, A.S.] (Kremnitzer & Ghanayim, 2002: fn. 94). In short, the authors appear to assume that the holding in Kol Ha'am was not merely that *likely* means

'probable' and that the test established by Kol Ha'am was one of probability, but rather that the test established by Kol Ha'am was a probability test requiring 'near certainty' or an 'almost definite' threat assessment.

## 4. Conclusion: The Likely Evolution of the Near Certainty Test

How did 'probable' become 'nearly certain'? In 1953, Justice Shimon Agranat faced a dilemma. How does one express the concept 'probable' in a language that does not have a word that distinguishes between 'probable' and 'possible'? Agranat's solution was to coin a new Hebrew term: *karov l'vadai*. Clearly aware that the new term literally meant 'nearly certain' and not wishing to be misunderstood, Agranat repeatedly emphasized that by *karov l'vadai* he meant 'probable' and explained that by *probable* he meant 'that may reasonably be expected to happen'.

The probability test for prior restraint was again applied by the Court in Levi Geri in 1962, discussed and rejected as inapplicable in Dissenchick in 1963, and not heard from again until 1978. In the interim, President Agranat coined a new term for *probable*. In the 1967 criminal appeal Dahan and Ben Haroush, Agranat proposed adopting the term *mistaber* for 'probable', drawing upon the term employed by mathematicians for 'probability'. The new term was immediately adopted by the Court and the legal community not only in criminal contexts. By the time the Court again made recourse to Kol Ha'am, the new term for 'probable' had displaced the former, ambiguous term in legal discourse and in legislation.

It would appear that as the result of the adoption of a new term for 'probable', the semantic field of the former term shifted. Having been replaced by *mistaber* in common usage, the term *karov l'vadai* was no longer understood as a term of art for 'probable', but rather in accordance with its literal, plain meaning.

If I am correct in asserting that reading *karov l'vadai* as 'nearly certain' was the result of a semantic shift resulting from the adoption of the term *mistaber*, and perhaps also under the influence of the justifiable use of the use of the term *karov l'vadai* in its plain meaning rather than as a term of art in criminal case law and literature, then it is understandable that the Court did not devote any effort to explain or justify a test that it did not think was any more strict than the one established in Kol Ha'am. Of course, if one reads Kol Ha'am carefully, it becomes clear that *karov l'vadai* means nothing more or less than 'probable'. But Kol Ha'am is a seminal case that every Israeli law student reads in the first year of law school. It would not be surprising if legal scholars and justices of the Supreme Court did not feel a need to reread a case that they knew so well, any more than an American jurist would feel a need to reread Marbury v. Madison, or Carlill v. Carbolic Smoke Ball to recall the holding. This conjecture may be supported by Barak's footnote to his Harvard Law Review article in which he states that Kol Ha'am established

that "'likely to endanger the public peace' means there is near certainty", even though that was not the holding in Kol Ha'am.

It is also possible that the Court could unwittingly make such a fundamental change in its doctrine of prior restraint because it reflected not only a semantic shift, but also because that shift was consistent with the internalizing of a change in Israeli society's view of the importance of freedom of expression. While 'probability' was deemed sufficient for prior restraint in cases of a threat to the public peace or national security in Israel's state of emergency in the 1950s, when the fledgling state saw itself in a fight for survival, 'near certainty' just seemed obvious and non-controversial by the late 1970s, in a state in which the government no longer controlled the news media, in which the press was not largely an organ of political parties, and that had experienced peaceful transfers of power.

In the end, it would appear that the narrowing of the broad discretion afforded by Justice Agranat's flexible probability test and the resulting, strict near-certainty test for judicial review of prior restraint and infringement of freedom of expression may not have been the product of a contemplative process, but rather an incidental consequence of a linguistic process that caused the term *karov l'vadai* to be understood in a manner that was more consistent with the evolution of Israeli society's conception of democratic values and the importance of freedom of expression.

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