The Study of Jewish Law in the Age of Fading Law, Dr. Hila Ben-Eliyahu

The legal system in Israel, but not only in Israel, is coping with a phenomenon that, although not new, has taken on dimensions that must be addressed by the research community: the phenomenon of "Fading Law".  The Law with which we are familiar, in which judges adjudicate based on laws, and at times stray from those laws, is steadily disappearing.  Conflict resolution movements, along with Therapeutic Jurisprudence and multicultural perspectives on law which actively object to the advancement of a single, unified legal narrative, only add to the impossible load placed on judges' shoulders and to the public's dissatisfaction with the long, exhausting legal processes that leave the sides injured and angry for years.  All of this influences and reflects one simple phenomenon: Courts no longer uphold the law.  Without distinguishing between the different courts and types of cases, the raw numbers are astonishing: some say 88 percent of cases, some 90, and in the United States there are those who say that 95 percent of cases do not conclude with a legal decision by the Judge.  Various types of alternative procedures take the place of traditional court decisions, lead to decisions that cannot be appealed or are not subject to judicial review, do not continue the production of new law, and whose relation to positive law must yet be researched.

The Age of Fading Law challenges the entire world of law as we have known it: how will such a system function over time, will it have procedural guidelines in the event that it ceases to produce its own legal precedents?  What sort of relationship will be built between an academy that researches law and a legal system that does not perform law?  What types of lawyers will such a system require, and what training will suffice for its judges?  Will traffic officers enforce laws, and if so, which?   And which legal fields will remain beyond the scope of the compromise, and will not fade?

It is precisely in this subject that Jewish Law can provide an answer not only for itself.  It may lead the research of law in general to rethink the legal system, its relation to the law, and its relation to legal research in general and the training of lawyers and judges in particular.

Both the historical and the *halakhic* materials reveal that courts of Jewish Law always preferred compromise over other legal solutions, whether the compromise was positive, involved Therapeutic Jurisprudence, or was based on the aspiration for a law of peace, or whether the preference came from lack of other options, stemming from concern over negative effects that may arise from adjudicating based on *Torah* law in a culture of dispute and multiple voices, or from external pressures stemming from the courts' standing as a not-always-legitimate alternative to the sovereign legal system.  Such a system, which foregoes stability and certainty for the sake of other values, places the Judge, not the Law, in the center, and challenges the world of research from several directions.  Some of these challenges have been partially researched, yet I seek to present them in this lecture as a whole and will categorize them into four new-old directions of research.