The legal conception of "religion"

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SUMMARY

In accordance with Article 13(2) of the *Leiden University Doctorate PhD Regulations 2015* and the *Memorandum on PhD Dissertations Consisting of Articles*, dated 30 March 2010, this dissertation is comprised of an unpublished introduction, four substantive chapters each of which has been (or will be shortly) published in a law review or journal, and an unpublished conclusion. Thematically, the first and second chapters may be read together as "Part One," and the third and fourth chapters as "Part Two."

Part One begins with an in-depth analysis of the *JFS* case in the United Kingdom. In that case, a claim was raised that JFS, a state-sponsored Jewish school, improperly refused admission to an applicant who practiced liberal Judaism, but who was not a Jew under the Orthodox view of the school, because his mother was not Jewish and he had not converted.

The opinions of many of the judges in that case expressed a view that membership in a religious community is (or should be) based on the individual beliefs of its members. And because the applicant believed himself to be Jewish and practiced liberal Judaism, the judges concluded that the Orthodox definition based on matrilineal descent violated the Race Relations Act. I suggest that by focusing on the applicant's beliefs, the courts introduced a Christian normativity. The courts then penalized the school for deviating from that norm in its application of Orthodox Jewish law to determine which applicants were Jewish.

One might be tempted to think that the courts of Israel, a self-described Jewish state, would be less susceptible to introducing Christian bias into their legal understanding of religion. In Chapter Two, I critically review three cases from the Israeli Supreme Court concerning who qualifies as a Jew under Israeli civil law. Somewhat surprisingly, I found that Israeli courts not only took the same position as the British courts, but that they did so on the premise that treating belief as the sine qua non of religion was religiously neutral. I propose several theories for why this may have come to pass and suggest how these findings fit into the secularization debate.

Given the findings in Part One, Part Two asks how "religion" as a legal term of art could be applied in less biased manner. Chapter Three explores various types of definitions, and the shortcomings of each, in defining religion as a general matter, and in defining it for legal purposes, primarily in the context of U.S. law. I conclude that none of the available options are particularly attractive, and suggest avoiding relying on explicit protections for religious liberty when other legal guarantees, such as freedom of speech, will suffice.

Chapter Four addresses the same issue in the context of Article 9 of the European Convention on Human Rights. I note that even before judicial decisions are reached, the text of Article 9 itself is biased in favor of confessional religions because of its equation of religion with belief and conscience. Some of the court's doctrines have exacerbated this bias, while others have made remedies difficult to obtain. I locate part of the difficulty in the nature of Westphalian system, which reduced the legitimate reach of religion to the *forum internum* and transferred legitimate temporal authority to the state.