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Discretion in Declaratory Relief

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The focus of this chapter, and the other chapters, is the *mere declaration.* It is a remedy of great interest. Much of what controversy there is in respect of the declaration is as to *bare* or *mere declarations*.

To sensibly consider the issues that emerge from this topic requires traversing a path that winds a little. This is inevitable whenever we confront in law the phenomenon of "discretion". Some particularly meandering bits of our path emerge by reason of the *source* of the mere declaration. In amongst this are troublesome distinctions that abound in the law; for instance – public and private law; statutory and common law; common law (in the other sense) and equity. Even more interesting is the possibility that notions that are less frequently talked about in the common law (that is in the other sense) play a role; for instance – does the remedy of the mere declaration play a particular role in a "law of relationships"[1] or a "law of status"? What of Professor Dworkin's distinction between "weak" and "strong" discretion and, following this distinction, the positing of some "discretions", but not others, within the positivist conception of a legal rule or within a system of rules?[2]

1 Of course a deal has been written about this. A prescient introduction is the far too little read paper of Jeffrey Hackney, "More Than a Trace of the Old Philosophy" in P Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997).

2 R Dworkin, "Is Law a System of Rules" (1967) 35 *University of Chicago University Law Review* 14.