3. Genuine conscientious non-militarists stand the chance of having their applications for non-military service rejected by any examining board established to determine the authenticity of their objections.

Disadvantages for the Nationalist Government:

1. A significant proportion of conscientious non-militarists are likely to be unsympathetic to the Nationalist government's policies.
2. Even if they are not, all conscientious non-militarists irrespective of their reasons for objection, will be seen to be persons who object to service in the SADF and who are thus opposed to the aims and objectives of the SADF.
3. An alternative national service scheme is likely to conflict with the work of the SADF's Civic Action Programme because the latter is designed to win the help and co-operation of the local populace in ministering the potential for guerilla warfare.
4. Because of the above it will prove to be rather difficult for the government to co-opt non-militarists into its "total strategy" programme.

But whatever the disadvantages for the non-militarists and the Nationalist government, it is quite obvious that on the whole, the introduction of alternative national service would be a positive step, both for the solution it provides to the non-militarist's problem and the opportunity it presents for the government to devote itself, in accordance with the requirements of responsible rule, to some of the more serious problems confronting the people of South Africa.

CONCLUDING REMARKS

From the above it may be seen that to the government, conscientious objection is a political phenomenon. And it is so because it is an act of opposition against participation in a military structure which has a certain political purpose. If the SADF was a force dedicated to the protection of truly national interests rather than the military arm of apartheid which it is, then conscientious non-militarism could more easily be provided for.

However, because of its political nature no amount of argument is likely to convince the Nationalist government of the morality of conscientious objection. What is required from campaigners for alternative national service is the formulation of pragmatic models for the implementation of such service. They will have to show that the provision of alternative national service for conscientious non-militarists is the best possible solution in the circumstances to the problem of conscientious non-militarists.

There is yet a further demand on protagonists of alternative national service. Arising from the continued opposition of the Nationalist government to the introduction of such service is the improbability of its acquiescing to the call for this service. The pro-

vision of alternative national service will have to appear as a government inspired project emerging from "new" circumstances which it has considered.

In 1978 the PFP spokesman on defence and MP for Yeoville, Harry Schwary, mentioned that Parliament was still looking for a solution to the problems raised by conscientious objection and that the current reliance on detention was purely a provisional "solution". He said:

> "We are looking for a solution and, interestingly enough, the hon. the Minister virtually said the same thing. The hon. the Minister did not pretend that he thought this was the ideal solution. He did not pretend that he might not one day come along with something different. On the contrary, the hon. the Minister has come along, quite clearly and honestly, and said that they do various things in all other parts of the world and that he believes that this measure is the best we can do in the circumstances, but that if there was something better one day he certainly would look into it."(34)

To this P.W. Botha responded, "Of course!" (35) Let us take the hon. the Minister at his word.

FOOTNOTES

1. Defence Amendment Act, No. 85 of 1967.
2. In May 1972 with the introduction of the present Section 16(2) and the previous section 126A of the Defence Act, No. 44 of 1957 (hereinafter all sections referred to, are sections of this Act unless otherwise stated); in August 1974 when Section 121(c) was enacted; and again in March 1978 when the current Section 126A was introduced.
3. Hansard, 24 May 1972, Col. 7977.
4. ibid.

5. The Defence Amendment Act. No. 66 of 1972 which was then under discussion in the House of Assembly included the present Section 16(2). This section provided for the attachment for service or training of any SADF member "who belongs to any category of professionally qualified members whose services are not required in their mustering in that (Citizen) Force, to a Government Department, other Government service or other authority which the Minister may approve for the purpose. . . ." Raw proposed the deletion of the words "professionally qualified" and suggested that conscientious non-militarists could then be accommodated under this section. This proposal was defeated.

6. Hansard, 24 May 1972, Col. 7971.

7. The National Council of the SACC had adopted a resolution which, inter alia, called "on its member Churches to challenge all their members in view of the above whether Christ's call to take up the Cross and follow Him in identifying with the oppressed does not, in our situation, involve becoming conscientious objectors."

8. See Hansard, 26 August 1974, Col. 1485.

9. Hansard, 29 October 1974, Col. 6853.

10. Hansard, 28 March 1978, Col. 3295.

11. For a more detailed analysis see Smail A., *The Incidence of Conscientious Objection in South Africa,* (unpublished paper, January 1980).

12. For an introductory analysis of the means, aims and objectives of total strategy see Moss G., *Total Strategy* (Paper delivered at the 57th NUSAS National Congress, Durban, December 1979).

13. According to Pretorius, "The total onslaught against Southern Africa cannot be countered in a purely military way. This conflict has to be resolved in a co-ordinated manner, using all the State's capabilities in the military, psychological, economic and political fields." (Address to Jewish Veterans League, quoted in PARATUS, July 1979). Lloyd has mentioned that approximately 80% Defence actions "are non-military although the military forces have a keen interest in it and may in its secondary role, participate in such action". (Paper delivered to the Urban Foundation (Natal Region) Workshop, Durban, 10 August 1979).

14. Quoted in editorial, CAPE TIMES, 25 October 1979.

15. For an outline of some of the features of the CAP see Smail A., *The Civic Action Programme: A Brief Overview,* (MILCOM unpublished paper, December 1979).

16. Hansard, 26 August, 1974, Col. 1476.

17. Ibid., Col. 1484.

18. Hansard, 28 March 1978, Col. 3295.

19. Ibid., Col. 3318.

20. However, the provisions of section 67(3) are at best only a mild reflection of the intent expressed in the statements quoted. For a full explanation of the terms and practice of this section see Smail A., *Alternative Service and South African Conscientious Objectors,* (unpublished paper, January 1980).

21. Ibid.

22. For a numerical breakdown of the types of conscientious objectors in South Africa see Smail A., *The Incidence of Conscientious Objection in South Africa.*

23. See Botha's statement on the increase of non-combatants in Hansard, 29 October 1974, Col. 6855, and quoted below.

24. Quoted at Hansard, 15 August 1974, Col. 801.

25. Ibid.

26. According to recent calculations the figure since 1973 is well over 1 000. For further details see Smail A., *The Incidence of Conscientious Objection in South Africa,* (Unpublished paper, January 1980).

27. Since 1974 when the South African Council of Churches challenged young men in the Church to consider whether they should not be conscientious objectors, virtually all the major churches in South Africa have called on the government to make provision for objectors, particularly non-militarists. The State's response emerged as early as 1974 shortly after the SACC resolution, with the introduction of Section 121(c) which has severely curtailed free discussion of conscientious objection in the Church. Thereafter, in 1978 the State actually increased the penalty for conscientious objection from imprisonment for 15 months to imprisonment for up to three years.

28. Resolution on civil disobedience passed by the annual meeting of the SACC in 1979.

29. Hansard, 28 March 1978, Col. 3317-8, and 29 March 1978, Col. 3477.

30. *SCALA,* February 1979, article entitled "Catchword: CONSCIENTIOUS OBJECTION". In 1977 when a new National Service Act was introduced, requiring no more than a simple declaration to obtain non-militarist status, there were over 70 000 applications for alternative national service. This figure dropped back to about 40 000 when the Supreme Constitutional Court declared a few months later that the Act was invalid.

31. Hansard, 29 October 1974, Col. 6855.

32. On this subject see Kearney P., *Areas of Need in which Alternative National Service can Operate.* (Paper delivered during MILCOM focus week on Alternative National Service, May 1979).

33. Smail A., *The Incidence of Conscientious Objection in South Africa.*

34. Hansard, 29 March 1978.

35. Ibid.

PROVISION FOR CONSCIENTIOUS OBJECTORS IN RHODESIA, THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY

February 1980

Thanks must go to Etienne Mureinik who in 1976 did much of the original research on the legal position of conscientious objection in the United States of America.

PROVISION FOR CONSCIENTIOUS OBJECTORS IN RHODESIA, THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY

This is a three-part paper which is intended to do no more than briefly describe legislative provisions made for conscientious objectors in Rhodesia, the U.S.A. and West Germany. These countries have not been randomly chosen. Rather, they have been deliberately selected to provide examples of a system which makes virtually no provision for conscientious objectors, one which makes partial provision and the last which makes almost total accommodation for objectors. The object of presenting a mere description of these different systems as opposed to a comparative analysis is simply to provide information on how different countries have coped with the problems raised by conscientious objection, and in so doing, it is hoped that a foundation will be laid for the development of a model which can adequately meet the needs of conscientious objectors in South Africa.

The description of the provisions in each of these countries relates to different periods. This is due to a number of factors such as the abolition of the drafts as in the case of the USA, or the occurrence of rapid changes in the recent past, as in Rhodesia or merely a lack of information on the position beyond a certain time, as is also the case in Rhodesia. Nevertheless, these differences in time in no way detract from the exercise at hand. Problems peculiar to each country are dealt with in their appropriate places below.

RHODESIA

The law governing conscientious objection in Rhodesia as described below refers to the period 1974-1977. No attempt has been made to deal with the period after this time because in recent years the fluidity of the political situation in this country has resulted in numerous legislative changes. Consequently, it has become virtually impossible to obtain records of recent legislation. However, the position of conscientious objection in Rhodesia in the period under discussion affords an example of a country in which conscientious objection is not regarded as a legal right and, at best, a limited category of conscientious objectors are accommodated at administrative discretion.

1. Liability for Service:

The basic legislative provisions are contained in the Defence Act (1) as amended. In terms of Section 26(1)(a) of this Act as amended by the Defence Amendment Act (2):

> "every resident between eighteen and thirty years of age, both included, shall be liable to undergo service training in terms of this Act."

A resident is defined by the Act as "any male inhabitant of Rhodesia who has resided therein for a continuous period of not less than six months"(3) other than an "African", or someone who is serving in the Regular Force (4) or other Military Forces, or a person who is not a Rhodesian citizen and who is in the service of the government of a foreign country, or a person who has been granted exemption from military service.

If, through failure to comply with the Act, a person has not undergone service training for which he is liable, he may be required to undergo such service training even if he is already older than thirty.(5)

2. Duration of Service:

When notified that he has been called up for service training a resident must undergo such service training for a prescribed period not exceeding six years.(6) The initial period of continuous training may not exceed 365 days. And thereafter, a resident is liable to report for at least one camp and a number of parades each year.(7)

3. Active Service:

In addition to his liability to undergo service training the White male resident may be required to render active service. The Act provides that:

> "every resident between eighteen and fifty years of age, both included and every member of the Regular Force shall be liable to render personal service in defence of Rhodesia in time of war or such other time as the Minister deems it necessary or desirable in the interests of defence or public safety."(8)

The Minister of Defence may, "whenever he deems it necessary or desirable in the interests of defence or public safety" order the employment of the Territorial Force (9) or a reserve or any member thereof (10) and/or require any resident between 18 and 50 years of age, who has not been called up for service training to undertake temporary service training in the Territorial Force."

The duration of active service is solely at the discretion of the Minister of Defence.

4. Lawful Conscientious Objection:

The only provision made for conscientious objectors is embodied in Section 45. This Section provides that:

> "(1) A person, other than a member,(12) whose bona fide religious beliefs inhibit participation in military service for the maintenance of peace or

public safety in the defence of Rhodesia may apply to the prescribed board for exemption from service or training in terms of this Act.

(2) The prescribed board may, on an application made in terms of subsection (1):

(a) grant the application and in that event the applicant shall, notwithstanding any of the provisions of this Act, be exempt from service or training in terms of this Act; or

(b) recommend that the applicant be required to undergo such service or training as the Commander (13) may decide is not inappriate to the applicant's beliefs; or

(c) refuse the application.

(3) Where any question arises as to whether a person is, in terms of this section, exempt from service or training in terms of this Act, the burden of proving the claim of exemption shall lie on the claimant."

Rhodesian law thus recognises that a person may have conscientious objections to rendering military service. Section 45 is simultaneously far-reaching in its possible consequences and extremely limited in the method of provision for conscientious objectors.

Section 45 is surprisingly liberal with regard to the various types of conscientious objection which may be accommodated. For exemption is open to both universal and selective objectors whether they be non-combatants, non-militarists or non-conscriptees. But, at the same time application for exemption may only be made by bona fide religious objectors. In addition, such application must be made by the objector prior to reporting for service, because once he is a member of the Defence Force he may not apply for exemption in terms of Section 45.

However, these limitations are to a certain extent negated by Section 46(6) which provides that:

"Notwithstanding any of the provisions of this Act, an exemption board may exempt any person, other than a member of the Regular Force, from service or training in terms of this Act."

Nevertheless, the problem remains that only bona fide religious objectors who are not members of the Defence may *apply* for such exemption *on the basis of conscientious objection.*

Despite these well intentioned provisions the problem remains that the granting of exemption to conscientious objectors is entirely at the administrative discretion of the exemption board. No new power to exempt objectors is conferred on the board by Section 45. The Board already has this power by virtue of Section 46(6). In addition, the decision of an exemption board is final and is not subject to appeal in a court of law,(14) although the common law right of judicial review remains to ensure that the board does not exceed its powers or depart from the requirements of justice and equity.

5. Unlawful Conscientious Objection:

All types of conscientious objection are unlawful in Rhodesia if the objector has not been granted exemption. Such unlawful objection is an offence and punishable by law.

Any person who is liable to undergo service training, has received notice of call-up, has not been exempted from service training and who "fails to present himself for service training at the date and place specified" in the call-up notice, is guilty of an offence and liable on conviction to a fine not exceeding five hundred dollars, or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.(15)

Similarly, if a person has been called up for active service and he is liable to render such service, but fails to present himself at the date and place specified in the call-up notice, he is guilty of an offence and liable on conviction to the same penalties imposed for failure to render service training.(16)

6. Evaluation:

Because the granting of exemption depends on administrative discretion it cannot be maintained that conscientious objection is a right recognised as such by Rhodesian law. At best, provision for objectors is informal, although when made, it is more complete than the provision made for objectors in the vast majority of countries.

UNITED STATES OF AMERICA

Within a few hours after the signing of the Vietnam cease-fire agreement an immediate end to the draft in the USA was announced (17) and on 30 June 1973 the President's authority to induct men into the United States armed forces expired.(18) Thus, the examination of the provisions for alternative national service in this paper does not extend beyond this time. However, there is an abundance of information on this subject. This is largely due to the untiring efforts of two organisations dedicated to the assistance of conscientious objectors, namely, the National Inter-religious Service Board for Conscientious Objectors (NISBCO) and the Central Committee for Conscientious Objectors (CCCO). Consequently, this section will be dealt with in much more detail than those devoted to Rhodesia and West Germany.

1. History:

The law governing the administration of the draft in the USA distinguishes itself by its complexity. This is evidenced not so much in the language of the statutes as in the judicial interpretation of these laws and the administrative procedures which were established to implement them. To facilitate the development of a keener understanding of the relevant legislative provisions and procedures a brief outline of the history of conscientious objection in the USA is necessary.

The right of conscientious objection was recognised by the early colonies and later provided for in state statutes and constitutions. As early as 1775 this right was protected by a resolution of the First Continental Congress and the First federal legislation on this subject was passed during the Civil War. This legislation left the decision to individual states. During the war both the North and the South resorted to conscription. But the idea met with serious opposition including "draft riots" among unwilling draftees in several cities. But before the end of the war, Congress provided exemption for all conscientious objectors regardless of state policy on the matter.(19) Thus, as Mureinik has pointed out, the USA already knew conscientious objection before modern Europe was even acquainted with universal conscription.(20)

A national draft was first established with the coming of the First World War. Conscientious objection was again provided for by the 1917 Draft Act.(21) This legislation restricted exemption to an objector who was a member of a "well-recognised sect or organisation at present organised and existing and whose existing creed or principles forbid its members to participate in war in any form." Conscientious objectors who were recognised as such by the law were nevertheless required to serve in the armed forces, but were allowed to perform non-combatant duties. The constitutionality of this Act was upheld by the Supreme Court under the free exercise and establishment clauses of the first amendment.(22) The court further decided in *Kramer* v *US* (23) that this provision could not be relied on by any objector whose objections were based purely on philosophical, social or humanitarian beliefs. Exemption was thus confined to members of historically pacifist sects.

The provision was given a wider interpretation by the Secretary for War, who, in January 1918, instructed that "personal scruples against war" be considered valid conscientious objection under the law.(24) And in March of the same year President Woodrow Wilson issued an executive order (25) removing the requirement of membership. The Act was then actually administered in accordance with these instructions, (26) until conscription ended with the termination of the war.

In 1940 the Selective Training and Service Act(27) which re-imposed the draft, broadened conscientious objector status to include all pacifist conscientious objectors. It defined a conscientious objector as one "who by reason of religious training and belief is conscientiously opposed to participation in war in any form". Objectors were now required to perform non-combatant service outside the armed forces but under the supervision of the Selective Service System.(28) They were thus allowed to perform civilian duties but under executive authority. However, because of the imposition of the "religious" qualification, the Act excluded many objectors who would have qualified under the 1918 administrative dispensation.

Mureinik supplies a comprehensive description of the judiciary's response to this legislation. For this reason his findings are merely summarised below. The lower federal courts divided on the interpretation of the statute. In *US v Kauten* (29) (1943) the Second Circuit court of appeals decided that objection based on a mere "compelling voice of conscience" fell within the ambit of the law, thus considerably broadening the definition of "religious training and belief".(30) The court subse-

quently applied this "compelling voice of conscience" test to exempt a non-religious objector in *US ex re Philips v Downer.*(31)

But on the other side, in *Berman v US* (32) the Ninth Circuit interpreted "religious training and belief" to mean "responsibility to a supernatural authority". Thus, belief in a supernatural authority was required before an objector could be granted exemption. However, the upshot of both *Kauten's* and *Berman's* cases was that the phrase "religious training and belief" was interpreted as distinct from objections to war based on philosophical, sociological and political beliefs. These latter were held to be invalid as bases for conscientious objection. The draft expired on 31 March 1947 but was reintroduced again in 24 June 1948.

In 1948 through the new Selective Service Act,(33) Congress aligned itself with the Ninth Circuit by requiring that the objector's belief relate to a "Supreme Being". The Act defined "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations but does not include essentially political, sociological or philosophical views or a merely personal moral code".(34)

In 1964 the Second Circuit struck down the legislation on due process grounds in *US v Seeger,*(35) although the Ninth Circuit had upheld the constitutionality of the statute twelve years earlier in *George v US.*(36) *Seeger's* case then went to the Supreme Court.(37) Although the court upheld the constitutionality of the Act, it developed a definition of religion so broad that, in Mureinik's words, "it effectively reduced the 'Supreme Being' clause in the Act to a nullity".(38) The court decided that the phrase "religious training and belief" could include "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent". The crucial test was what the conscientious objector, himself, regarded as religious.(39) Justice Clark put it this way:

> "The test of belief in relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not."(40)

Exemption was now available to objectors whose objections were not based on traditional religious beliefs. But the question of whether an atheist could claim conscientious objector status was left open.(41) However, the Tenth Circuit, in following Seeger, held in *Fleming v US* (42) that an objector, despite being predominantly influenced by sociological and political views, might be granted exemption if some influence exerted by religious training could be found. And three years later in *US v Shacter* (43) a federal district court granted objector status to a declared atheist when it held that his beliefs could have been "reached by religious training and belief as that term (had) been construed by the Supreme Court in *Seeger.*"

However, the right to conscientious objector status remained limited to universal objectors. This had been indicated by Judge Hand in *US v Kauten* (44) and was not deviated from in *Seeger's* case.

2. The Vietnam Era:

By the early stages of the Vietnam war the legislation governing service in the United States armed forces was the Universal Military Training and Service Act of 1951 as amended.(45) The following outline of the provisions and procedures dealing with liability for service and conscientious objection relates to the period 1966 to 1973.

a) Liability for Service:

In the USA the draft was administered by the Selective Service System (SSS) which was an administrative agency of the executive branch of the federal government. Congress was responsible for the law under which the System operated, the President issued and revised the regulations to implement the law and the Department of Defence determined the number of draftees the System had to supply.(46)

Each male U.S. citizen, wherever he was, had to "present himself for and submit to registration", within five days before or after his 18th birthday.(47) This period was later extended to 30 days.(48) Many male aliens resident in the USA were also required to register. There was a continuing duty to register,(49) which remained until the age of 35. Registration was done through the Local Boards of the SSS. Persistent failure to register resulted in prosecution. Registrants were thereafter classified according to their response to a classification questionnaire which they were required to complete. Classification categories indicated whether a man was available for military service, was a conscientious objector, had had his service deferred or had been exempted. Induction into the armed forces was accomplished by means of a lottery system. A man's lottery number was chosen by a draw during the calendar year of his 19th birthday. The draw thus affected one's classification. For instance a man classified 1-H (Holding status – not currently subject to processing for induction) could have his classification changed to 1-A (available for military duty). Once a man's number was drawn for induction he was liable to render military service. The length of compulsory service was two years.

b) Lawful Conscientious Objection:

As noted above, by the beginning of the Vietnam era exemption was available for only universal conscientious objectors whose opposition was based on a firm religious belief in relation to a "Supreme Being". However, it was also noted that this latter requirement had been interpreted so broadly in *Seeger's* case so as to include an objector whose belief is "sincere and meaningful (and) occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."

With the introduction of the Military Selective Service Act (50) in 1967 Congress omitted the "Supreme Being" clause. However, the question of how the phrase "religious training and belief" was to be properly interpreted still remain unresolved. It was only in 1970 that the Supreme Court faced the issue in *Welsh v US.*(51) Here the court explicitly recognised the "compelling voice of conscience" test as expounded in *Kauten's* case. It held that the exemption was available to "all. . . . whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become an instrument of war."(52) The result of the decision in *Welsh's* case was stated quite well by Mureinik:

> "Hence the aggregate effect of four decades worth of judicial manipulation has virtually been to elevate to the status of positive law an administrative practice which had prevailed in 1918 and which had been submerged after the First World War under the weight of retrogressive legislation."(53)

In a memorandum (54) to its Local Boards in July 1970 the SSS established a "sincerity" test over and above the requirements laid down in *Welsh's* case. In terms of this test, if the Local Board found that a claimant's beliefs were not sufficiently "deeply held" and therefore insincere, they were deemed to be "essentially political, sociological or philosophical views". On this basis the claimant's application would fail. This approach was supported by the Ninth Circuit in *US v Coffey.*(55) There is also evidence that the administrative practice was to rely on this type of investigation to severely circumscribe the scope of the criteria laid down in *Welsh's* case.(56)

c) **Procedure and Classification:**

In the USA provision was made for both the conscientious non-combatant and the non-militarist. The SSS classified objectors into two categories: 1-A-0 for conscientious objectors who were available for non-combatant military duty only; and 1-0 for objectors who were opposed to both combatant and non-combatant military service but were available for assignment to civilian work.(57)

The procedure for gaining either classification was as follows. Unless the objector wished to volunteer immediately for civilian service he had to complete the classification questionnaire and indicate therein that he was a conscientious objector and return the questionnaire to the local board. (Failure to return the completed questionnaire within 10 days after the date on which it was mailed resulted in the registrant's immediate classification as 1-A, (available for military duty). Thereafter the Board sent him a special form for conscientious objectors, which the objector then had to complete and return to the Board. In completing this form the objector was required to give full particulars of his objection, as well as information on his background and participation in various organisations.

Thereafter no further action was required by the claimant until he received notice of classification. If he received a classification which was unacceptable the usual procedure was then for him to submit a written request for a personal appearance before the Local Board. At the hearing the claimant "may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight." In addition, he "may present such further information as he believes will assist the local board in determining its proper classification." (58)

The Local Board consisted of three members of either sex who were over 18 and under 65 years of age and who lived in the county in which the Board operated. Board members were unpaid volunteers and could not serve for more than 20 years nor be in the armed forces or military reserves. They were nominated by the governor of the state and appointed by the President of the United States. A paid civil servant functioned as clerk of the Board and was responsible for carrying out its decisions and placing before it, requests of the registrants. In practice many Local Boards were not able to examine all the files of registrants. They relied on the clerks to make those classifications which seemed to be "routine". Although such classifications were illegal the sheer weight of the numbers virtually compelled the Boards to operate in this manner.(59)

There were approximately 4 100 Local Boards and over these were 96 State Appeal Boards, at least one for every federal court district. If a registrant was not satisfied with either the original notice of classification or that which was issued following a Local Board hearing, he had the right to appeal. The same right was available to the claimant of conscientious objector status. The appeal had to be made in writing within 10 (later 15) days after the date on which the notice of classification had been mailed, by sending it to the Local Board. A state appeal agent attached to the Local Board then filed the appeal. A dependent of the registrant or his employer could appeal on the registrant's behalf. But by 1972 only the registrant himself had the right to appeal. (60)

Appeal Board members could be volunteers or paid, had to be between the ages of 18 and 65 and could not serve more than 20 years or be members of the armed forces or military reserves. They had to be residents "of the area in which their board was appointed".(61) The Appeal Board made its decisions solely on the basis of the registrant's file unless he requested a personal appearance. The registrant could not be inducted while an appeal was pending.

After the Appeal Board had made its decision the Local Board then issued the claimant with another notice of classification. If he was still not satisfied with his classification the registrant had a further right of appeal to the President, but only if at least one member of the Appeal Board had dissented from the classification given. An appeal had to be lodged within 15 days. If the decision of the Appeal Board was unanimous, the claimant could not avail himself of the

Presidential Appeal. However, an appeal could still be taken by the state or national director of Selective Service, if it was "in the national interest or necessary to avoid an injustice".(62) Induction was not necessarily postponed while these directors were considering whether or not to take the appeal.

Appeals to "the President" were heard and decided by a civilian National Selective Service Appeal Board independent of the Director of Selective Service.(63) This Board consisted of at least three paid members, who could not be members of the armed forces. This Board represented the President.

After a Presidential Appeal a new notice of classification was issued to the claimant by the Local Board. The decision of the National Appeal Board was final. However, if circumstances changed or if new evidence could be produced after the National Appeal Board decision, a Local Board, state director or the national director could reopen the case. Then the entire process could be repeated. Reopening cancelled any order to report for induction.

d) **Non-combatant Status:**

An objector could acquire non-combatant status either by receiving such classification (1-A-0) prior to induction or by transfer to non-combatant duty under Department of Defence regulations, in the case of a person who became a conscientious objector after he had been inducted into the armed forces.(64)

Non-combatant duty for conscientious objectors in the armed forces was defined by the President (65) in 1949 as follows:

(i) service in any unit of the armed forces which is unarmed at all times;

(ii) service in the medical department of any of the armed forces, wherever performed; or

(iii) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

"The term 'non-combatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

Non-combatants were given 16 weeks training divided into two main periods of eight weeks each. The first period consisted of basic military training including operations in combat situations. The second period dealt with the particular functions of the position in which the non-combatant would be serving. Thereafter, the non-combatant was assigned to his particular area of military work. Most non-combatants were trained for service in medical units.

e) **Alternative National Service:**

A conscientious non-militarist who was accorded classification (1-0) as such was

permitted to perform civilian work as an alternative to military service. The duration of this alternative national service was two years. The objector either found or was issued with an appropriate job.

Civilian work which was considered appropriate for a 1-0 registrant had to fall within the definition set out in the Selective Service Regulations. This definition was as follows:

"(i) Employment by the United States Government, or by a State Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia;

(ii) Employment by a non-profit organisation, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organisation, association, or corporation, or for increasing the membership thereof;(66) or

(iii) Employment by any agency whose work is like that above, so long as the registrant's own activities are not for profit.(67)

Private employment, other than by approved non-profit organisations, was specifically ruled out.(68)

In addition, the civilian work done by conscientious non-militarists had to meet the following requirements:

"(i) National Health, Safety or Interest. The job must fulfill specifications of the law and regulations.

(ii) Non-interference with the competitive labour market. The registrant cannot be assigned to a job for which there are more numerous qualified applicants not in class 1-0 than spaces available. This restriction does not prohibit the approval of special programs such as Peace Corps or VISTA for alternate service by registrants in class 1-0.

(iii) Compensation. The compensation will provide a standard of living to the registrant reasonably comparable to the standard of living the same man would have enjoyed had he gone into the service.

(iv) Skill and talent utilisation. A registrant may utilize his special skills.

(v) Job Location. A registrant will work outside his community of residence."(69)

If a registrant was classified 1-0 he could volunteer for alternative national service. He applied to his Local Board and could propose jobs, although his job choice was not guaranteed approval. If a volunteer's job choice did not meet with approval or if he failed "to locate a suitable job" after volunteering, he

was processed only when his lottery number was reached, as though he had not volunteered.(70)

In the case of a non-volunteer 1-0 registrant, a type of civilian work was assigned to him. The Local Board issued him with a number of forms (71) and thereafter the objector had 60 days in which to propose jobs for consideration.(72)

If one of the proposed jobs was approved the Local Board issued the objector with an order to report for alternative national service. If the job choice was not approved, the objector could request that the National Director review it. Only one review was permissable. If the registrant's job proposals were still not approved then the National Director authorised the issuance of a mandatory work order. Such an order was also issued if the objector had failed to submit any job choices of his own. Failure to respond to a work order rendered the objector liable to prosecution. The objector could also be prosecuted if he left his job without permission or if he failed "to comply with the reasonable requirements of an employer."(73)

However, if within 270 days after the registrant had exhausted his 60 day search an alternative national service job had not been found, he was placed in a lower priority selection group.(74)

Alternative national service could be performed in a variety of fields including community work, health care, environmental concerns, education, youth work, legal services, child welfare, research and even war/peace concerns. It was Selective Service policy that objectors drafted for alternative national service should work the same hours, receive the same pay and vacation, and be subject to the same conditions as the other employees on the same job. Moreover, employers could terminate the employment of assigned objectors on the same basis as other employees. If employment was terminated prior to the completion of the required 24 months service, the State Director could order the registrant to another job. If, however, the State Director "determines that the registrant's depature was without jusitifcation he will report the registrant for prosecution."(75) The State Director could also order the objector to another job if at any stage he determined that the original job had ceased to be acceptable as alternative national service.(76)

After being issued with a work order the registrant was classified 1-W and could request early release from alternative national service at any time. If such release took place prior to the completion of six months, the registrant's classification could be re-opened.(77) But a State Director was, nevertheless, empowered to release the objector prior to his completion of 24 months service "upon a determination of hardship, medical, or other bona fide basis."(78)

The right of conscientious non-combatants and non-militarists to conscientiously object to combatant and military service was even further protected by recourse to the civilian courts. If the objector failed to obtain a satisfactory classification after exercising his Selective Service appeals, he could challenge the decision of

the SSS in a court of law. Although the law provided that the decisions of Local and Appeal Boards were final, there was a common law right of judicial review, which permitted the Court to examine whether the administrative boards had properly applied themselves to the matter and that the procedures of fairness and equity had been observed. In effect this resulted in judicial interpretation of the law which often afforded assistance to the objector.

However, there were certain restrictions which governed the judicial review. In 1944 the Supreme Court had decided in *Falbo v US* (79) that before a person could raise the matter in court he would have to "exhaust his administrative remedies." For the objector this meant that he would have to exhaust his appeals under the SSS before the matter could be reviewed by a court of law. In addition, the Military Selective Service Act provided that:

> "No judicial review shall be made of the classification or processing of any registrant. . . . except as a defence to a criminal prosecution. . . . Provided, that such review shall (consider matters normally decided by draft boards) when there is no basis in fact for the classification assigned. . . ."(80)

Yet despite these limitations objectors' classifications were frequently reviewed, often with very satisfactory results.

f) Unlawful Conscientious Objection:

As noted above, although the law only provided exemption for an objector "who by reason of religious training and belief is conscientiously opposed to participation in war in any form", judicial interpretation had so extended the meaning of the phrase "religious training and belief" that only objectors whose objections were based on "essentially political, sociological or philosophical views"(81) or solely on a "merely personal moral code",(82) were excluded from the right to exemption. Again, as recorded above, this right was only available to non-combatants and non-militarists who were universal objectors.

Apart from these categories, all other types of conscientious objection were unlawful. In 1971 the Supreme Court specifically ruled in *Gillette v US*(83) that "persons who object solely to participation in a particular war" were rightfully excluded from conscientious objector status.(84) In addition to selective objectors and that class of universal objectors who were refused exemption, all conscientious non-conscriptees were excluded from official recognition as conscientious objectors.

Unlawful conscientious objectors were liable to a maximum of five years imprisonment and/or a fine of 10 000 dollars. Fines were almost never imposed unless the defendant had a jury trial.(85) A federal civilian court had jurisdiction unless the objector had already been inducted.

3. Evaluation:

It is quite apparent that the administration of the SSS demanded a large and costly

bureaucracy. And it is debatable whether the energy and expenditure was justified. Certainly, the procedures for classifying conscientious objectors could have been streamlined. However, it must be borne in mind that the Local Boards, Appeal Boards and National Appeal Board did not only exist to deal with applications for objectors status. In fact, they handled the entire registration and classification system of the draft.

Essentially there are two methods of testing an objector's bona fides in order to ensure that provision is made only for genuine conscientious objectors. Firstly, classification of an objector can be done by a panel which decides on the basis of evidence submitted by the person claiming to be a conscientious objector. And secondly, any form of alternative service provided for objectors could be subject to such conditions that ensure that the alternative service is more demanding than military or combatant service.(86) Of course, there could also be a combination of these two methods. But the essential feature of each method is as follows:

In the case of the former, reliance for the determination of conscientious objector status is placed entirely on the persons constituting the panel. And it is not improbable that such persons could make mistakes. In the second case, it is the objector, himself, who has to determine whether his convictions are deep enough to compel him to opt for the more arduous alternative service, although this may constitute unfair discrimination against objectors.

It is interesting to note that the SSS relied entirely on the panel method. Mistaken classifications were intended to be rectified by the elaborate system of appeals and finally, resort to the judiciary. In this respect, the provisions made for objectors almost amounted to recognition of conscientious objection as a valid legal right. For the attachment of harsh conditions to alternative service can always be interpreted as a primitive measure manifesting an attitude which fails to recognise the validity of the conscientious objector's stand.

However, United States law only made provision for a limited category of conscientious non-combatants and non-militarists. This was perhaps the greatest drawback for the recognition of conscientious objection as both a human and a legal right.

WEST GERMANY

Due to distance, language barriers and the like, not much information is available on the detailed nature of the provisions for conscientious objectors by the Federal Republic of Germany. However, enough is known to indicate that in terms of the protection accorded to conscientious objectors of the countries which have compulsory military service West Germany is currently one of the most progressive.

1. **Liability for Military Service:**

In terms of The Basic Law (constitution) of the Federal Republic (87):

> "Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence Organisation."(88)

The law in fact requires that all males render military service of fifteen months and further reserve exercises for short periods during subsequent years.(89) But all male residents of West Berlin are immediately exempted.(90) Failure to render military service is punishable by law; unless an exemption has been granted.

2. **Lawful Conscientious Objection:**

The right to conscientiously object to the bearing of weapons or to service in the armed forces is recognised in the constitution. The relevant provision reads as follows:

> "No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law."(91)

Thus the law establishes both conscientious non-combatancy and conscientious non-militarism as legal rights enforceable in a court of law. The reasons for the objection are irrelevant to the enforceability of the right. The basis for the objection may be religious or not, selective or universal. All that is required is that the objection be genuine. The claimant of objector status must be a conscientious objector within the full meaning of the term.

3. **Procedure:**

The constitution provides that any "person who refuses, on grounds of conscience, to render military service involving the use of arms, may be required to render substitute service".(92) The law (93) governing conscientious objection in pursuance of the constitution actually provides for compulsory alternative service:

> "Whoever, due to his conscience, opposes participation in any use of arms between the nations, and therefore refuses to do armed military service, has to render a compensatory civil service, instead of his military service, outside of the armed forces. He can, at his application, be enlisted into the armed forces as a non-combatant."(94)

The right to refuse to do armed service is decided on application.(95) Conscientious objectors are required to make written application to the local compensatory civil service office; the Kreiswehrsatzamt.(96) The latter then makes arrangements for the investigation of each application.

The method ensuring that only conscientious objectors receive status as such, is examination by special examining commissions. These commissions are established by the particular state government.(97) There may be one commission for one or

more Kreiswehrsatzamt.(98) Each commission consists of a chairperson appointed by the Minister of Defence, an assessor from the state government or someone who has been appointed by its particular department, as well as two honorary assessors who are elected by the commission. The chairperson has the advisory voice. He must be a member of the judiciary or occupy a high post in the civil service and must be older than thirty-two. This age qualification also applies to the assessors.(99)

The examination of each application is conducted in the presence of the applicant. The commission must take into consideration the applicant's entire personality and his moral conduct.(100) Witnesses are not required to take an oath and the delivery of affidavits is inadmissable.(101) During the proceedings the applicant may be accompanied by his legal representative, who may make independent petitions.(102) If a decision is not made in the examination time, the commission may summon the applicant for a further examination. The latter may be conducted by a newly constituted commission.(103)

Should the applicant receive an unfavourable decision he may appeal to the courts.

4. Non-combatant Service:

Persons who are accorded non-combatant status are required to serve in the armed forces for the requisite fifteen months, but are exempted from armed combat and from the duty to take part in training which prepares the conscript for armed combat.(104) Conscientious non-combatants are not necessarily allotted to internationally recognised non-combatant units, nor do they have a right to such allotment.

5. Alternative National Service:

The length of compensatory civil service is determined by the constitution which provides that the duration of such service "shall not exceed the duration of military service".(105) Accordingly the period of alternative national service has been set at eighteen months. Civic service conscripts are exempt from further duties after this period of service.

Social work is the pivotal point of the civic service programme. Conscientious objectors are put to work in hospitals, old people's homes, environmental projects, institutions for handicapped people and other social facilities.(106) In addition, objectors have the option of performing development service inside the Federal Republic or in developing countries, under the auspices of authorised organisations.(107)

6. Unlawful Conscientious Objection:

Conscientious non-conscriptivism is the only form of conscientious objection which is unlawful in West Germany. However, other forms of objection are also illegal if the objector has not been accorded conscientious objector status. The penalties and provisions relating to unlawful conscientious objection are not known.

7. **Incidence of Objection:**

The generous provisions of the law have been accompanied by a huge increase in the number of applications for conscientious objector status. Between 1958 and 1966 there were between 2 500 and 4 500 applications. This figure climbed to 12 000 in 1968 and to over 40 000 in 1976.(108)

In 1976 the Federal Parliament passed a new National Service Act which did away with the examining commissions, In terms of this law a simple declaration was sufficient to obtain recognition as a conscientious objector. As a result there were over 70 000 applications for conscientious objector status in 1977.(109) However, the validity of the Act was challenged in the Supreme Constitutional Court. The latter was of the opinion that this law practically discontinued the obligation to render compulsory military service. Accordingly the Act was struck down as unconstitutional.

Since then the number of applications for objector status has settled at about 35 000 to 40 000 a year.

8. **Evaluation:**

Like the SSS in the USA, the West German system relies entirely on an examining panel to determine the bona fides of a person applying for conscientious objector status. The problems relating to such a system have been mentioned above. But in at least two respects German implementation of the examination board system is superior to that of the SSS. Firstly, the Federal Republic has taken the panel method to its logical conclusion by establishing conscientious non-combatancy and conscientious non-militarism as full legal rights. And secondly, the system is administered with a simplicity which reduces the problems of bureaucracy to a notable extent.

The only major drawback of the West German system is the non-recognition of non-conscriptivism. However, it is debatable whether such provision could be made without undermining the very foundations of compulsory national service.

CONCLUSION

This paper consists merely of a description of three different models of provisions for conscientious objectors. However, a full understanding of these models, particularly the provisions relating to alternative national service, will not be gained from the mere knowledge of their provisions, policies and practices. What is required is that this description be supplemented (by the reader) with a study of the historical situation prevailing in each of the subject countries during the periods under examination. Only in this way will a sufficiently full appreciation of the various models be acquired to permit the formulation of an appropriate model for South Africa.

FOOTNOTES

1. Chapter 94 of the code of Rhodesian statutes which contains all laws made by the Rhodesian Parliament on or before 31 August 1974, hereinafter all sections referred to are sections of this Act, unless otherwise indicated.
2. No. 37 of 1974.
3. Section 2.
4. The equivalent of the Permanent Force of the South African Defence Force (SADF).
5. Section 26(2).
6. Section 34(1).
7. Sections 34(4) and (5).
8. Section 40.
9. The equivalent of the SADF's Citizen Force.
10. Section 41.
11. Section 42.
12. A member is defined in Section 2 as "an officer, non-commissioned officer or soldier of the Defence Forces."
13. Of the Defence Force.
14. Section 46(5).
15. Section 31(3).
16. Section 43(1).
17. THE REPORTER FOR CONSCIENCE'S SAKE, February 1973, Vol. XXX, No. 2 NISBCO, cited hereinafter as THE REPORTER.
18. THE REPORTER, July 1973, Vol. XXX, No. 7.
19. For a slightly more detailed account of this history see Maddocks, L.I., *Legal and Constitutional Issues Regarding Conscientious Objectors,* CCSA Washington Office, 16 November 1965; and Useem M. *Conscription, Protest and Social Conflict,* John Wiley and Sons, New York, 1973.
20. Mureinik E., *Conscientious Objection: The United States and South Africa,* in LEXIS, NUSAS, Cape Town, 1978, p. 63. Conscription was introduced in Europe by Carnot to defend revolutionary France against invading Austrian armies.
21. 40 Stat. 76 (1917).
22. Selective Draft Law Cases 245 US 366 (1918).
23. 245 US 478 (1918).

24. Maddocks, op. cit., US Dept. of War: *Statement Concerning the Treatment of Conscientious Objectors in the Army (1919).*

25. Exec. Order No. 2823 (March 20, 1918).

26. Stone: *The Conscientious Objector,* 21 Column UQ 253, 263, 269 (1919) cited by Mureinik at p. 64.

27. 54 Stat. 889.

28. This was the body responsible for the administration of the draft.

29. 133 F 2d 703 (2d Cir. 1943).

30. In fact the court defined the phrase "religious training and belief" to mean "a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse". (at p. 708). On this basis the Court confirmed Kanten's conviction because it was not pursuaded that "the registrant did not report for induction because of a compelling voice of conscience which (it would) regard as a religious impulse". (at p. 708).

31. 135 F 2d 521 (2d Cir. 1943).

32. 156 F 2d 377 (9th Cir. 1946).

33. 62 Stat. 604 (1948).

34. The pertinent section of the Universal Military Training and Service Act is section 6(j) which provides in part that:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

35. 326 F 2d 846 (2d Cir. 1964).

36. 196 F 2d 445 (9th Cir. 1952).

37. 380 US 163 (1965).

38. Mureinik, op. cit. p. 65.

39. According to Justice Clark, local draft boards "are not free to reject beliefs because they consider them incomprehensible. Their task is to decide whether the beliefs professed by a registrant are sincerely held and. . . . in his own scheme of things, religious." 380 US 163 (1965) at 175.

40. Ibid. at 176. The liberality of the court's view can be seen in the fact that it held that Seeger fulfilled the requirement of belief in a Supreme Being although