

Thirdly, blame is placed on the Commission when it should frequently be placed on the national governments. The absurd list of items excluded from the free trade agreement with Eastern Europe (most of the products in which they have a comparative advantage) was at the insistence of the national governments and against the vigorous opposition of the Commission negotiators. Fourthly, Mr Hurd's complaint that many accusations against the EU were unfounded is dismissed as "politically expedient denials". [p. 16] Yet some of these Euro-myths are repeated here. EU rules do not require that all cheese be round or rectangular, or that sawdust be removed from butcher's shops. [pp.18-19] Many regulations which are attributed to the EU are the result of British law, as Christopher Booker has demonstrated in his *Sunday Telegraph* column.

Underlying this pamphlet is a public choice analysis of government, with references. This perspective is never presented in a clear and coherent way for the uninitiated to understand. Public choice writers argue that bureaucrats have a natural tendency towards "size-maximisation" or empire building, and that interest groups will seek to manipulate intervention to protect their own interests, eg the proposed ban on tobacco advertising would protect state tobacco monopolies from competition. There is the basis here for an excellent paper which would explain public choice theory in simple terms and use the case studies to demonstrate how this works in practice within the EU. The reader would then be provided with a tool of analysis to examine all Commission proposals with scepticism, and a reason to believe that there are many more examples of bureaucratic interference in our nooks and crannies. A revised edition please!

Nigel Ashford

***Speaking My Mind:
The Autobiography of Rhodes Boyson***

Peter Owen, London, 1994, 210 pp., £24.50 (hbk)
(ISBN 0-7206-0901-1)

No - the book does not consist of two hundred blank pages. Sir Rhodes Boyson is certainly a man who speaks his mind - so I hope he won't mind if I speak mine! He is not, I must admit, one of my favourite people. While he's a pleasant enough person to talk to and does at least possess a sense of humour, his beliefs are simply too authoritarian. He appears to want Britain as a whole to be basically a grand scale version of Highbury Grove school. It's ironic that this outspoken denouncer of collectivism is himself one of the biggest collectivists I've ever come across on non-economic issues!

Since I'm an outspoken supporter of children's rights, and he in many ways epitomised the kind of Head I campaign against, the fact that our views on education differ will hardly be a revelation. While I generally share his beliefs in traditional teaching methods and curricula, some kind of testing, and lowering the school leaving age, I certainly do not share his beliefs in corporal punishment, school uniform - surely one of the most collectivist ideas of all? - compulsory religion, and general outlook on how schools should be run. I have always been sceptical of his accounts of life at Highbury Grove, and other schools where he was the Head - on the principle that the last person one can expect an objective account of a school from is the Head!).

He also contradicts himself more than once - admitting that his first pupils in 1950 were his worst is surely an

odd statement from someone who frequently talks of declining standards of discipline. He claims that boys are "naturally tribal animals". I wasn't - nor was he! As for his claim on page 245 that "Vigorous team games... decline in schools... young create... more brutal games to fill the vacuum" - I would advise him to turn back to page 14, where he describes his childhood sport of purring, boys kicking each other on the legs with iron-tipped clogs. Personally, my favourite childhood game was "British Bulldog"! And his support for the educational voucher, the assisted places scheme, and allowing "groups of parents... Christian fundamentalists and Muslims - to opt in to grant-maintained status" is surely nothing but a sneaky way of demanding taxpayers' money for private education.

His story is of the working-class boy made good, moving from Labour to Tory and from Councillor (originally Labour - he was a Labour Party member until pushing forty) to Minister of State. He claims to have been converted to Conservatism by studying the nineteenth century liberals, and that "By 1968 I also noticed that socialist governments made decisions to bolster their short-term popularity and not the long-term industrial improvement of their countries" - to which I would only dissent by replacing the word "socialist" with "all" and by enquiring which planet he'd been living on before 1968!

The strongest influence on him appears to have been his father, an old-fashioned socialist trade unionist of courage, principle and integrity. Some of his son's ideas are, however, both collectivist and downright nasty - for instance:

I believe freedom comes from the acceptance of necessary restraints and inhibitions... if need be, compulsory... I opposed... easy abortion and the homosexual reforms. [p.78]

So I assume that he'd have kept both state persecution of adult homosexuals and the backstreet abortionist!

On page 232, he informs us that "Anybody not prepared to carry... an identity card is up to no good or is suffering from advanced libertarianism" - what does he mean - suffering?

However, to give credit where due, he gives us a tip on page 52 - "Be nice to officials, listen to them and nod wisely but ignore their advice and do what you think is right" - and tells the truth that dare not speak its name:

A National Health Service would never work, since demand would always exceed supply even if 105% of the GNP were spent on health. All males between the ages of twelve and eighteen had to belong to a local uniformed organisation which meets together at least one evening a week, one weekend a month and one week a year. [p.130]

But then he goes and spoils it:

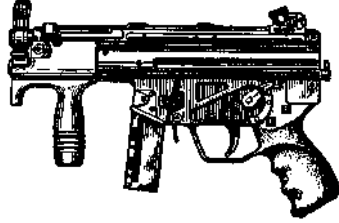
There should be established in each local area a 12-to-18-year-old general service unit run by ex-servicemen on the lines of a cross between the Outward Bound schools and Dad's Army. [*ibid.*]

Would Sir Rhodes care to look at the history of Germany in the 1930s - or of all totalitarian regimes, for that matter? Would he also care to glance over the manifesto of the British National Party?

Incidentally - I'd also like this member of the Mont Pelerin Society to address it on his view that economics is "an easy or even a non-subject.... Economists muddy the waters so that the rest of society cannot see how shallow they are."

However, I'd like to close by saying that he's never been a great Euro-enthusiast and is becoming more and more Euro-sceptic as the years go by; he regrets never having been a Cabinet Minister - may I say that we could have done worse than make him Foreign Secretary? Come to think of it - we have!

Mark Taha



***Sir Matthew Hale, 1609-1676:
Law, Religion and Natural Philosophy***

Alan Cromartie

Cambridge University Press, Cambridge, 1995, 225 pp.,
£40.00 (hbk)

(ISBN 0 521 45043 8)

If Sir Matthew Hale (1609-76) is known for anything today it is for his comment on the question of rape in marriage:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which, she cannot retract.

This passage occurs in Hale's *History of the Pleas of the Crown*, written over three centuries ago. Such was Hale's standing as a legal authority that it was only as recently as 1991 in the House of Lords decision in the celebrated case known as *R v R* that his judgment was held to be wrong, largely on the basis that Hale's approach was out of keeping with modern attitudes.

Whatever our individual views on the specific question of "marital rape", this decision by the House of Lords represents a radical example of judge-made law. This raises the age-old fundamental question of whether judges are entitled to *make* law at all or whether they are not authorised to do more than *declare* what the law is. In practice, of course, the borderline between law-making and a purely declaratory function is a narrow one, and it not always easy to determine on which side of the divide a particular decision falls.

Nevertheless, there can be little doubt that the rejection of Hale's dictum on marital rape has changed the law. This change could presumably be justified by arguments drawn from the concept of sexual equality, though no such arguments appear to have been considered or advanced by the House of Lords in the *R v R* case.

Putting aside the question of whether we as individuals think the law ought to recognise the concept of rape within marriage, it is worth looking at the process of thought by which the present law lords came to their conclusion on it by contrast to the way Hale reached his conclusion on it. The real difference between the two approaches is that, while the modern law lords treated the question of marital rape in isolation from everything else, Hale dealt with it as part of the law of contract, marriage being of course a contract between husband and wife.

This is typical of Hale's approach to the law in general. To Matthew Hale the common law of England was not made up of a whole lot of isolated decisions but was a unitary logical system based on a small number of basic principles, which it was the duty of the courts as the

judiciary and also of the executive and legislative branches of government to declare.

Matthew Hale was not alone among the lawyers and parliamentarians of the mid-seventeenth century in seeing the common law and the constitution as immutable. This view of the law was actually to be found among royalists and anti-royalists alike.

After the victory of Parliament over King Charles I and his execution in 1649 a new Great Seal was introduced bearing the words "*First Year of Liberty Restored*". In other words, the claim was not to have thrown off the shackles of centuries of monarchical rule but to have "restored" the ancient constitution which had been dishonoured by the late King's conduct.

In fact, after Charles I's execution on the 30th January 1649 the monarchy was not formally abolished. The wording of the relevant statute, passed about 6 weeks after the king's death, is revealing. Despite its title, an "Act for the abolishing the Kingly Office", the statute does not actually abolish the monarchy but merely enacts "that the office of a king in this nation shall not henceforth reside in, or be exercised by, any one single person." In other words, while monarchy is seen as an integral part of the immutable constitution, it is placed in commission, so to speak.

In May 1649 a more radical law was enacted which first formally labelled the state a "Commonwealth". But even this statute stops short of actually abolishing the monarchy; it merely declares that the people of England "shall from henceforth be governed as a Commonwealth and free-state by the supreme authority of this nation, the representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them for the good of the people, and that without any king or House of Lords."

To some extent, of course, this was a legal fiction. No state can exist indefinitely without any change in the law. The question is: to whom is the power and authority to change the law, i.e. to make law, entrusted? The unequivocal answer that the English Revolution gave to this question was: Parliament, or, after the Restoration, King-in-Parliament. But certainly not the judges.

Matthew Hale was a judge - and not only a judge but also Chief Exchequer Baron and then Lord Chief Justice of King's Bench under Charles II. And, though he lived in a turbulent period of English history when rival claims to power were advanced on all hands, yet he never tried to arrogate legislative power to the judges. He even took the view, contrary to the majority of judges (and of constitutional practice both then and now), that judges could be sacked at will by the King!

Alan Cromartie's book affords some insight into the mind of this great jurist. Unfortunately, the book spends an undue amount of space on religion and philosophy, areas in which Hale was not a pre-eminent thinker by any means. It therefore falls between several stools. It is not a biography, although it has a brief "summary life" at the beginning. Nor is it a "life and times" book. Its greatest strength is in portraying Hale's thoughts, but even here it is tantalisingly brief. The emphasis on the writings of such figures as Coke and Selden, who influenced Hale, is such that the tail almost begins to wag the dog. What one reader at least was particularly anxious to find (in vain, alas!) was an in-depth analysis of Hale's own legal writings and, perhaps more than anything else, his judgments.

Michael Arnheim