(2013) 15 Ecc LJ 344–348 © Ecclesiastical Law Society
doi:10.1017/S0956618X13000483

NOTABLE ECCLESIASTICAL LAWYERS: III

Hugh Davis (1632–1694)

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Among post-Restoration civilians, Hugh Davis is a neglected but not insignificant representative of his profession. His life and work stand as testimony to the participation by civilians in the life of the nation and in larger legal currents of the times. Davis was the author of a treatise called *De jure uniformitatis ecclesiasticae* (1669): begun in the heady years following the restoration of episcopacy, the treatise marshalled the traditional learning of the *ius commune*, combining it with the newer methods of the natural law school to defend and advance the cause of uniformity within the English Church. The text exhibits some of the scars of the Civil War and Interregnum without relying on them or even dealing with them directly. Davis looked beyond. Composed within the designedly irenic traditions exemplified by Richard Hooker, his treatise also belongs within that great movement of thought in which John Locke and Thomas Hobbes were the main English contributors.

LIFE AND CAREER

Davis was born in 1632 to a quite modest family, his father being a cook at Winchester College.[1] The son, however, was a child of promise. He was chosen to be a scholar of the College in 1644 and matriculated as a plebeian at Wadham College, Oxford, in 1651.[2] He soon transferred to the Wykehamist foundation, New College, where he was admitted as a Fellow in September 1654.[3] As is so often true, we know little of the nature and extent of his studies at New College, but they were certainly within the civil law faculty and

1 See D Mateer, 'Hugh Davis's commonplace book: a new source of seventeenth-century song', (1999) 32 *Royal Musical Association Research Chronicle* 63–87. Except as noted, the biographical information in this note comes from that article, whose author admirably explored the material in the archives in Winchester, Staffordshire and Oxford for information about Davis. There is no entry for Davis in the *Oxford Dictionary of National Biography*.
2 See R Barlow (ed), *The Registers of Wadham College, Oxford: Pt 1* (London, 1889), p 193.
3 *Alumni Oxonienses: the members of the University of Oxford, 1500–1714* (London, 1891, reprint Bristol, 2000), vol 1, p 380.

they were certainly successful: when supplicating for admission to the BCL degree in 1657, he was described as a 'student of the Civill Law above six yeares standing of New College'. His later work, though not spent as a practising lawyer at Doctors' Commons or any of the diocesan consistory courts, amply confirms his mastery of the traditions of the European *ius commune* as they were then taught in the civil law faculty.

Although there is little doubt that Davis sought and expected preferment, in the event he advanced no higher than the rectory of Dummer, a village about five miles south-west of Basingstoke, within the diocese of Winchester. It was a middling living: in the 1870s the rectory had a value of £415.[4] Davis was first presented to the church in 1656; he was readmitted by the restored bishop of Winchester in 1661, seemingly by way of corroboration of his title. Despite the existence of a dispute between Davis and one segment of his parishioners and also a controversy over payment of first fruits of the benefice that was not settled until 1666, he held it until his death in 1694.

The title page of *De jure uniformitatis*, asserts that he was also chaplain to the Duke of Buckingham at the time of its publication, but that position led to no higher dignity in the Church. Davis also left a commonplace book that contains texts of contemporary songs of interest to musicologists, but his claim to our attention must rest on the legal treatise upon which he laboured over several years.

DE JURE UNIFORMITATIS ECCLESIASTICAE

Despite its Latin title, *De jure uniformitatis ecclesiasticae* was written in English. Its subtitle gives an alternative and perhaps slightly more accurate description of what it contains: 'Three books of the rights belonging to an Uniformity in Churches'. Its arguments rest upon what Davis described as 'the chief things' that mattered in law: the law of nature, the law of nations and the divine law. The English common law did not come into it. In each of the three books Davis developed arguments from these basic sources of law in an effort to show that uniformity in religious practice was supported by the dictates of the law of nature and the needs of communal peace. The question, he wrote, has been 'many times debated in the world with fire and sword',[5] but he hoped to enter the field peaceably. For him it was time for fire and sword to give way to a tranquillity based upon conformity with the laws of nature. Davis concluded that this resting place meant consistency of religious practice in the nation. Uniformity was, he thought, essential in 'preserving and promoting the publick welfare'.[6]

4 J Wilson, *The Imperial Gazetteer of England and Wales* (Edinburgh, 1870–1872), vol 2, p 604.
5 H Davis, *De iure uniformitatis ecclesiasticae* (London, 1669), Dedication (to Charles II).
6 Ibid, Prolegomena.

The treatise is not well known today and it must be admitted that it will not hold the attention of most readers for long. For understanding the contemporary status and utility of the *ius commune* within the Church of England, however, it furnishes an important vantage point on contemporary thought about the role of the law of nature in the government of the Church. In few other places is this perspective as easily accessible as it is in Davis' treatise.

There are three pertinent points to be made about the work. The first is its continued reliance upon authorities drawn from the European *ius commune*. Davis cast a wide net in the authorities upon which his treatise was based but almost all of them belonged within the traditions of European law. The text contains many references to the texts of the *Corpus iuris civilis* and, among the many civilians whose works he cited, Accursius (*c* 1182–1263), Bartolus de Saxoferrato (1313–57), Baldus de Ubaldis (1327–1400), Paolo di Castro/Paulus de Castro (*c* 1360–1441), Giasone del Maino/Jason de Mayno) (1435–1519) and Hugo Grotius (1583–1645) stand out as his announced favourites.[7] He relied upon the works of the canonists only slightly less often, reasoning that their authority 'in things just and regular, ought not to be the less regarded because it is papal'.[8] In confirmation of that attitude, one finds the works of Gratian (*fl* 1140), Bartholomew of Brescia/Bartholomaeus Brixiensis (d 1258), Panormitanus (1386–1445/53) and Diego de Covarubias y Leyva/Didacus Covarruvias (1512–77) cited as authorities in the treatise's pages. Davis even made use of St Thomas Aquinas to support his argument for the necessity of harmony between Church and state.[9] What one does not find in the treatise is any regular reference to authorities from the English common law. There is no Sir Edward Coke (1552–1634), no Sir Anthony Fitzherbert (1470–1538), no William Sheppard (*c* 1595–1674). Davis does quote from both *Bracton* and a treatise by Sir John Fortescue (*c* 1394–*c* 1479),[10] but he goes no further. In other words, his attitude was that of a traditionally minded English civilian. The treatise was as much concerned with political theory as it was with legal questions, and for that purpose the common lawyers may have seemed less relevant to Davis than the works of Continental jurists. Still, it is worthy of note that this kind of reliance upon the *ius commune* survived the Interregnum intact.

The second point is the treatise's application of the law of nature as developed by Continental jurists. Despite his traditional view of what counted as a relevant legal authority, Davis was 'up to date' on developments in the learned world. The sixteenth and seventeenth centuries witnessed sustained development of the law of nature as a guide and a tool for legal thought. It was the age of the Spanish

7 Ibid.
8 Ibid.
9 Ibid, book I, ch 1, § 13.
10 Ibid, book I, ch 3, § 19.

https://doi.org/10.1017/S0956618X13000483 Published online by Cambridge University Press

scholastics – men such as Francisco Suárez (1548–1617); it was the age of a German school of natural law, which included Samuel von Pufendorf (1632–94).[11] In particular, it was the example set by Hugo Grotius that seems to have been most influential with Davis. The law of nature has long been associated with reasoning by deduction from first principles. Grotius adopted this method but he also took an additional tack, frequently marshalling examples from history to establish and expand the understanding of the law of nature's tenets. This method has been called reasoning 'from the effect to the cause',[12] but it had this practical advantage: it employed examples from the past to put flesh on some of the quite abstract principles of the law of nature. Praiseworthy and blameworthy examples from the past helped Grotius, and others like him, come to grips with what the tenets of natural justice meant in practice.[13] The rules that God had implanted in the hearts of men were knowable in part by the process of reasoning, but also in part by how they had been put into practice in the past. This is what Davis sought to do with ecclesiastical uniformity – to show its consistency with the law of nature through both abstract reasoning and historical precedent. So, for example, he used the example of the ancient Hebrews and that of the Assyrian and Persian monarchs to demonstrate the natural advantages of unity in religious practice.[14] And to prove that 'prelacy is from God', Davis called to mind testimonies from human history as well as 'the universally approved assertion of the [Schools]'.[15]

The final point to notice is the treatise's promotion of ecclesiastical uniformity and the common good. Davis did not set out to prove that God had dictated the Thirty-nine Articles or even the *Book of Common Prayer*. He may have thought so, but he did not say so in the treatise. Nor did he draw any direct lessons from painful contemporary events in England. His argument went to the advantages of unity as the best source of concord in society as shown by reason and historical example. Without concord, 'the great fishes would swallow the small'.[16] In developing this theme, Davis did disagree with Grotius in one particular, even while adopting his method of analysis. Grotius had held that under some admittedly limited circumstances it was lawful to resist and even to wage war against one's sovereign.[17] Tyranny can reach a point where it need not be obeyed. Davis regarded this with suspicion. Though perhaps

11 See O Robinson, T Fergus and W Gordon, *European Legal History* (third edition, Oxford, 2000), §§ 13.1.1–13.4.6.
12 Eg R Cumberland, *A Treatise of the Laws of Nature*, tr J Maxwell (London, 1727), Introduction, § II.
13 See the essays in M Barducci (ed), *Grozio ed il pensiero politico e religioso inglese 1632–1678* (Florence, 2010).
14 Davis, *De jure uniformitatis*, book II, ch 9, §§ 10–13.
15 Ibid, book I, ch 3, § 3.
16 Ibid, book II, ch 3, § 9.
17 Hugo Grotius, *De iure belli ac pacis libri tres*, ed P Molhuysen (Leiden, 1919), book I, ch 4, §§ 10–19. See D Baumgold, *Contract Theory in Historical Context: essays on Grotius, Hobbes, and Locke* (Leiden and Boston, MA, 2010), pp 27–49.

tenable in theory, in reality this approach leads to 'frequent risings' and to great harm to the commonweal.[18] The same applied in spiritual matters. Uniformity establishes 'a more facile and firm amity and peace' among the people than does competition between factions.[19] The great precept of the law of nature established that 'the Creator and Governor of the World is to be served and obeyed'.[20] That being so, wrote Davis, his own conclusion about resistance to authority was preferable to that of Grotius. It was in greater accord with the lessons that were taught by the law of nature and confirmed by history.

This view, expressed at length, sits quite uncomfortably with accepted principles in the twenty-first century. Who today does not think that it was right to resist Adolf Hitler or Pol Pot? And who does not endorse individual freedom of choice in religion? But we do not live in the seventeenth century. And we still admire the boldness of the thought of Thomas Hobbes. By a standard that recognizes the differences between now and then, Hugh Davis deserves at least a nod of recognition – perhaps even a salute – from those among today's ecclesiastical lawyers who take an interest in the history of their profession.

18 Davis, *De jure uniformitatis*, book I, ch 3, §§ 20–21.
19 Ibid, book II, ch 1, § 4.
20 Ibid, book II, ch 2, § 2.

https://doi.org/10.1017/S0956618X13000483 Published online by Cambridge University Press