

捷克的轉型正義*

施正鋒

東華大學民族事務暨發展學系教授

摘要

自從 1990 年以來，中、東歐國家面對不堪回首的共黨極權統治，大致上是採取洗滌的方式，而捷克是最早採取洗滌措施的，也是被認為比較徹底的國家，西方國家甚至於認為，捷克民主轉型的成功要歸功於徹底執行洗滌。我們先將檢視洗滌的正當性，接著介紹洗滌的機制，再來討論人權保障的爭議，最後作簡單的檢討。

關鍵詞：捷克、轉型正義、洗滌法

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We had free elections, ... we elected a free parliament, we have a free press, we have a democratic government. Yet ... [t]here still exist and work the powerful structures of the former regime.... Many places are governed by the same people as before. They are connected to managers of industrial enterprises. There exist immense bureaucratic colossuses that preclude rational economic behavior of individual enterprises and firms. The old bureaucracy persists at all levels.

Vaclav Havel (David, 2003: 394)

But if revenge had been our motivation, there are more effective ways of going about it that inflict a far greater sanction than symbolic acts of condemnation, lustration, and restitution.

Vojtěch Cipi (1997: 231)

What would have happened in the Czech Republic if lustration hadn't passed? Perhaps we would be in the same position, merely as a result of the passage of time. . . . [A]lthough it may well be untrue[,] one can imagine that the blackmailers used up all the easily blackmailable targets in the first few years, and that the problem would have fizzled-out of its own accord even in the absence of any legal reform.

Anonymous (David, 2003: 430)

Vetting processes aim at excluding from public service persons with serious integrity deficits in order to (re-)establish civic trust and (re-)legitimize public institutions.

United Nations, OHCHR (2006: 4)

Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled.

Parliamentary Assembly, Council of Europe (1992)

壹、前言

捷克斯洛伐克（Czechoslovakia，台灣一般簡稱捷克）在 1918 年由奧匈帝國獨立，二次大戰後，共黨政變取得政權（1948-90）、淪為蘇聯的衛星國家¹。其中，在 1968 年短暫民主化，稱為「布拉格之春」（Prague Spring），旋即被華沙公約組織成員出兵鎮壓。在 1989 年底，人民發動非暴力的「天鵝絨革命」（Velvet Revolution），推翻共黨政權，開始推動民主轉型（democratic transition），特別是重視轉型正義（transitional justice）的工作。

針對加害者、以及受害者，轉型正義的機制可以歸納為失憶、除罪、補償、真相、洗滌、審判、以及報復（施正鋒，2010：266）。所謂的「洗滌」（lustration），是指透過聘任的行政程序，禁止加害者、或幫兇進入政府高層，免得這些人透過既有的權力網絡遂行支配，危害剛萌芽的民主政治。自從 1990 年以來，中、東歐國家面對不堪回首的共黨極權統治，大致上是採取洗滌的方式，也就是「去共黨化」，只有少數人被以「反人類罪」（crimes against humanity）加以起訴。

捷克除了著手平反、並補償受害者，還嘗試將加害者繩之以法，不過，儘管受害者一大堆、能找到的加害者不多，因此，司法審判並不太成功、甚至於有打蒼蠅之譏²；比較為人稱道的是洗滌，成效僅次於德國（東德）（David & Choi, 2005, Scarrow & Stein, 1994: 18-20; Naucler, 2006: 14-15）。在 1991 年 10 月 4 日，捷克國會通過所謂的『大洗滌法』（*Large Lustration Act*, 451/1991³），禁止所有跟秘密警察有糾葛的人擔任政府高層職位，隨

¹ 在 1960 年，將國名由「捷克斯洛伐克共和國」（Czechoslovak Republic）改為「捷克斯洛伐克社會主義共和國」（Czechoslovak Socialist Republic），又在 1990 年先後改為「捷克斯洛伐克聯邦共和國」（Czechoslovak Federative Republic）、以及「捷克暨斯洛伐克聯邦共和國」（Czech and Slovak Federative Republic, CSFR）。

² 可以信任的司法人員不足，應該是原因之一（Scarrow & Stein, 1994: 18）。在 1995-2008 年期間，捷克起訴了 168 名前秘密警察（State Security, StB）特務，最惡名昭彰的是其頭子，卻在捷克解體時趁亂逃往斯洛伐克，最後只被判了 15 個月（Olson, 2013-14: 16）。

³ 正式名稱為 *Act Determining Some Further Prerequisites for Certain Positions in State Bodies and Organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic*（451/1991）。

後在 1992 年 4 月 28 日通過『小洗滌法』(*Small Lustration Act*, 279/1992⁴)，稍微擴充範圍；在 1995 年 9 月 22 日，國會將法展期五年 (254/1995)，又在 2000 年 10 月 25 日立法無限延長 (422/2000)。該國在 1993 年解體為「捷克共和國」(*Czech Republic, CR*)、以及「斯洛伐克共和國」(*Slovak Republic, SR*)，前者的洗滌工作持續進行，後者則不再處理、於 1996 年底自動失效。

不管是捷克字 *lustrace*、還是英語 *lustration*，都是起源於拉丁字 *lustrare*，意思是透過宗教儀式來達到精神、或是道德層面的淨化 (Bronkhorst, 2006)。然而，在捷克確有負面的弦外之音，也就是秘密警察的檢查，因此又有一個人是否具有案底的意義；很諷刺的是，這個字在民主化後，竟然轉為意指檢視一群的特定的人是否在過去為特務、或是線民，尤其是政治人物、公職人員、以及法官⁵，頗有以其人之道，還治其人之身的味道 (David, 2003: 387-88)。聯合國人權高級公署 (OHCHR, 2006: 4) 直言，後衝突國家為了重建公民信任、以及建立公共機構的正當性，洗滌過程是法治工具之一。

在中、東歐民主化的過程當中⁶，捷克是最早採取洗滌措施的，也是被認為比較徹底的國家，西方國家甚至於認為，捷克民主轉型的成功要歸功於徹底執行洗滌。捷克在 1990 年舉行自由的國會大選，人民要求各黨候選人自清，然而，由於秘密檔案並未公開、而共產黨又拒絕配合，民選的國會後來乾脆正式立法著手洗滌。捷克之所以洗滌相當徹底，主要是因為當年蘇聯以坦克鎮壓布拉格之春，人民對於共黨的高壓統治記憶猶新，支持反對運動成立政黨進入國會，除惡務盡，所以可以在共黨垮台後很快就通過洗滌法，也是中、東歐國家唯一通過法律聲討共黨政權者⁷ (Szczerbowski

⁴ 正式名稱為 *Act on Some Further Prerequisites for Certain Positions Filled by Appointment or Designation of Officers of the Police of the Czech Republic and officers of the Penitentiary Service of the Czech Republic* (279/1992)。

⁵ Uzelac (2007) 特別提到「誰來監督監督者」(*quis custodiet ipsos custodes*) 的概念，也就是當司法人員本身就是共黨政權的幫兇之際，特別是法官，「寂靜的洗滌」(*silent lustration*) 是一種途徑 (p. 8)。

⁶ 共黨政權垮台的順序是波蘭 (1989/8)、匈牙利 (1989/10)、捷克 (1989/11)、羅馬尼亞 (1989/12)、東德 (1990/3)、南斯拉夫 (1990)、保加利亞 (1990)、阿爾巴尼亞 (1991)、蘇聯 (1991/4)。

⁷ 該法 (*Act on the Unlawfulness of the Communist Regime and Resistance against It*, 198/1993)

& Piotrowskv, 2008: 236-37; Naučlér, 2006: 13; Constitutional Court of the Czech Republic, 1993; 2001)。

儘管總統哈維爾 (Vaclav Havel, 1989-92, 1993-2003) 在兩次否決立法展延，兩次都被國會反否決，不過，他在天鵝絨革命十個月後，針對當年華沙公約組織軍隊入侵作了如下的陳述 (David, 2003: 394)：

我們已經有自由的選舉、自由的國會、自由的媒體、以及民主的政府，然而，舊政權的頑強結構還繼續存在而運作著，許多地方還是跟過去一樣，被同樣的一批人統治著。這些人跟產業及企業的經理人關係密切，龐然的官僚體系依然排拒個人企業及公司的理性經濟行為。老舊的官僚盤據各個層級。

我們無法知道他究竟是愛恨交織、還是跟國會議員扮演黑白郎君的角色 (Scarrow & Stein, 1994: 23)。不過，由『大洗滌法』的投票結果，還是可以看出民心向背左右議員的投票：當時，在 300 名國會議員當中，148 名贊成、31 名反對、22 名棄權，另外有 70 名未出席，勉強過關；第一次展延時 (五年)，支持、反對、以及沒有意見各佔三分之一；到了第二次展延的時候 (無期限)，民調顯結果大致不變 (David, 2003: 408-409; Williams, 2003: 17-19)。

由於捷克在 1948 年有類似的慘痛經驗，當時，反共政府的部長抗議辭職，共黨趁機發動政變，大家擔心舊事重演，尤其是又有 1956 蘇聯坦克入侵匈牙利、1968 年入侵捷克的前車之鑒。因此，當蘇聯於 1991 年發生流產政變 (August Putsch)，主導者是反對戈巴契夫進行改革開放的蘇共死硬派，加上蘇聯在東德邊境還駐紮 30 萬重軍，捷克人心有餘悸，驚慌的國會獲得百姓的支持，很快地就在六個禮拜後通過洗滌法 (David, 2003: 403; Williams, 2003: 15)。

宣告在 1948-89 年之間的共黨政權違法 (criminal, illegitimate and abominable) 而且令人鄙夷、共黨是違法而令人鄙視 (criminal and contemptible) 的組織、其領導者與黨員必須負起共同責任、人民的抗爭是正當而值得尊敬的。不過，不管是 Spanish National Research Council (2013)、還是 Institute for the Study of Totalitarian Regimes (2015)，都只有該法的捷克文版本。在 1993 年，41 名國會議員連署要求釋憲，然而，捷克憲政法庭不認為該法違憲 (Constitutional Court of the Czech Republic, 1993)。

接下來，我們先將檢視洗滌的正當性，接著介紹洗滌的機制，再來討論人權保障的爭議，最後作簡單的檢討。

貳、洗滌的正當性

Loś (1995) 認為洗滌可以有揭露歷史真相、維持起碼的正義、以及確保國家安全等目標，而 David (2003: 392-94) 觀察捷克國會議員當年立法之際的辯論，發現贊成立法的理由還包括保護人權及維護法治、捍衛領土完整、以及提高社會的互信；其中，維持正義的說法佔了一半，國家安全的考慮高達兩成，而人權法治、以及了解真相也各有 15%；相對地，反對者認為洗滌的作法可能會侵犯人權、出於報復的動機、以及造成政治對立。不過，誠如捷克前憲政法庭大法官 Vojtěch Cepi (1993-2003) 所言，如果真的要報復，在國人皆曰可殺的情況下，國會大可直接立法進行整肅，沒有必要拐彎抹角洗滌 (Cepi, 1997: 231)；畢竟，天鵝絨的領導者很自豪地說：「我們跟那些人不一樣」(2003: 406)。我們將 David (2003: 394-408) 的歸納整理如下：

一、維持起碼的正義

根據 1991 年的一項民調顯示，半數的人認為透過洗滌才可以改善政府部門及民間企業的人事陳痼。首先是針對權貴 (*nomenklatura*)、以及秘密警察，由於他們保有過去的政府內外人脈，即使不能繼續待在公家單位，也可以轉到民間企業繼續擔任管理階層的角色。另外，由於原來用人的標準並未改變，包括強調所謂的政治成熟、以馬列的途徑解決問題、以及貫徹黨的路線，再加上社會價值觀也沒有改弦更張，聽任無能貪腐的極權統治的官僚阻撓政治、經濟、以及社會改革。事實上，尸位素餐事小，讓人擔心的是這些人趁火打劫，在政府進行經濟市場化之際，由於法規尚未進入軌道，藉機牟利、把金錢匯入西方銀行因此，把清除那些跟過去糾纏不清的無用之徒，讓過去被排除的人有機會替國家做事，那是起碼的正義 (David, 2003: 395-96)。

一開頭，捷克的新政府期待舊政權的人能知難而退，後來發現，這是天真的想法，畢竟，如果沒有法律依據，要當過秘密警察的人自動離職、放棄既得利益，那是違反人性的。當時有兩股勢力進行激烈的角力，一派希望能真正推動和平轉移，另一派則想辦法維持現狀，而洗滌法就是初步改革挫敗下的立即產物，企盼透過「菁英翻轉」（rotation of cadres）來進行二度革命，唯有透過除舊布新、揮別過去，才能打破過去壓迫者對於新社會的支配（David, 2003: 397）。

二、保護人權及維護法治

前面是唯恐病毒潛伏、伺機發作，這裡的關懷是擔心政治人物相互指控政敵是秘密警察的線民，毫無節制，不僅損壞當事人的名譽、及人權，也破壞基本的法治。一開頭，不同的政府部門各行其是進行洗滌，完全沒有章法，甚至於完全沒有獲得當事人的同意。譬如外交部長 Jiri Dienstbier 在 1990 年 9 月下令洗滌所有的部裡頭的人員，下自司機、上到部長；又如捷克通信社（Czechoslovakia Press Agency）社長強迫 23 名前秘密警察特工自動離職，否則威脅召開會議公諸世人，讓他們在同仁前顏面盡失而無法繼續待下去；最粗暴的是捷克總理 Peter Pithart（1990-92）逼退自己的環境部長，只因為後者只不過名列秘密警察意欲吸收的單子，並未真正當線民。根據經驗，與其各打五十大板、禁止洗滌，並不能解決問題，因為同樣的情況會不斷發生；與其禁止、不如加以節制，為了避免諸如此類的獵巫行動不斷發生，大家體會到有必要立法，規範哪些職務、以及職等必須進行洗滌（David, 2003: 398-400）。

三、確保國家安全與公共安全

主要的立意是民主還在萌芽之中，可能面對來自內、外的顛覆而夭折。在 1989 年 11 月 28 日，也就是天鵝絨革命的高潮，秘密警察頭子下令採取政治手段來「解決社會危機」，目標是誤導「敵人」，特別是在媒體抹黑反對運動的領導者，讓老百姓認為這些人嚴重的意識形態分歧、個人的敵

對、以及路線之爭⁸。令人擔憂的是，即使共黨被迫交出政權，那些特務依然盤據內政部、影響新政府的人事認命，而且還唯恐天下不亂、利用手中的秘密檔案操弄政客互控。這些人還把魔掌伸向其他部會、媒體⁹、以及國營事業，不管是電視、收音機、報紙、公家機構、企業、甚至於工會，幾乎是無所不在¹⁰；即使這些人不是主管，也有可能使用手上的名單威脅上司。所以，為了防止政治醜聞一再爆發、防止政治人物被裹脅，唯一的解決之道就是揭露誰是秘密警察、或線民 (David, 2003: 400-401) 。

更令人擔心的是外力介入。由於蘇聯過去掌控中、東歐國家，特務往往以顧問身分進駐，KGB 很可能掌握各國的機密檔案。事實上，在這些國家民主化之後，赫然發現大量檔案憑空失蹤¹¹，新政權的領導者如果在過去與秘密警察過從甚密，不難想像會被俄羅斯特務用來操控。譬如在 1993 年領導斯洛伐克從捷克分離的政治人物 Vladimir Meciar¹²，他便好多次毫不靦腆地公開承認，在自己的辦公桌發現一些人的秘密檔案，當下利用這些資料一路往上爬，終究當上斯洛伐克的總理 (1990-92)，接著又擔任斯洛伐克共和國的總理 (1992-94, 1994-98)。其實，當俄羅斯特務頭子 Vladimir Putin 在 2000 年上台，中、東歐國家不敢掉以輕心，不知道什麼時候會把情資當正武器；換句話說，洗滌不是只有民主轉型的短期措施，更有國家安全的考量 (David, 2003: 402-404) 。

⁸ 另一種陰謀論是說，警察在 11 月 17 日武力驅散非暴力示威的學生，背後是 KGB、秘密警察、以及捷共策動的，目標是讓諸如戈巴契夫般的人以救星姿態出現，換句話說，整個天鵝絨革命的背後其實是捷共 (Williams, 2003: 3)。

⁹ 譬如在 1990 年，有 262 名秘密警察還待在、或是進入媒體 (David, 2003: 401)。

¹⁰ 在 1990 年，所有 8,591 名秘密警察全部獲得優退，被疑轉進繼續操控經濟 (Williams, 2003: 5)。

¹¹ 根據捷克聯邦憲政法庭 (Constitutional Court of the Czechoslovak Federal Republic, 1992)，內政部的檔案很多在政權轉移中被慌亂「處理掉」了，特別是負責「內部敵人」的第二處，90-95% 的保險箱是空的，20,337 卷宗只剩下 2,189，也就是 89.9% 不見了。

¹² 傳言他在 1980 年代中期擔任線民，被質疑從政仰賴秘密警察的卵翼，只不過，有關檔案於 1990 年初不翼而飛 (Williams, 2003: 5)。

四、揭露過去的真相

對於老百姓來說，比較關心的是了解共黨極權統治的真相，尤其是人權的戕害，然而，由於政府不願意公開秘密檔案，大家充滿狐疑，感覺上就是有人在隱藏一些東西，只能透過媒體殘缺不全的報導去拼湊。既然沒有真相，又要如何去原諒不知道是誰的加害者？此外，在資訊無法公開的情況下，如果選民不能了解候選人的背景，特別是有沒有當過秘密警察、或是線民，就很難對政治人物產生信心、也很難對民主政治建立信任感；換句話說，如果每到選舉就流言蜚語滿天飛，選民投票的自由意志就會大打折扣（David, 2003: 404-405）。

參、洗滌法

大體而言，我們可以將政治洗滌的運作分為對象（由官員、特務、到線民）、年限（由限期、展延、到無限）、以及職務（由行政、司法、國會、學界、到神職）等三個面向（圖 1）。所謂的洗滌對象是指被質疑過去擔任特定職務、壓迫老百姓的人，尤其是黨政高層、特務、或是線民，要求他們離開公職；聯合國開發計畫署（UNDP, 2006: 19）建議把洗滌的優先順序放在軍方、安全部門、情治單位、以及司法機構。洗滌職務則是針對攸關公共利益者，排除這些人任職，包括政府三權、媒體、學界、神職、甚至於國營或具有官股的事業。至於洗滌年限，有時無法在期限內完成，有可能修法展延、或者廢除年限。

根據『大洗滌法』（1991）¹³，不管是透過選舉、認命、或是指派，任職於國家機構或組織的高層，必須符合一些條件。這些單位包括憲政機構（總統府辦公室、國會、各部會、憲政法庭、以及最高法院）、軍方、國防部、安全情報（Security Information Service, BIS）、警察、總統府護衛（Corps of the Castle Police）、公營媒體、國營事業、以及國家組織（§§ 1）。任何人

¹³ 請見 Williams（2003: 13-15）比較草案與定案的差異。

只要超過十八歲，就可以向這申請洗滌證明書 (lustration certificate) (§§ 8) ；至於在 1971 年 12 月 1 日以後出生的公民，就不用接受該法的規範 (§§ 20) 。

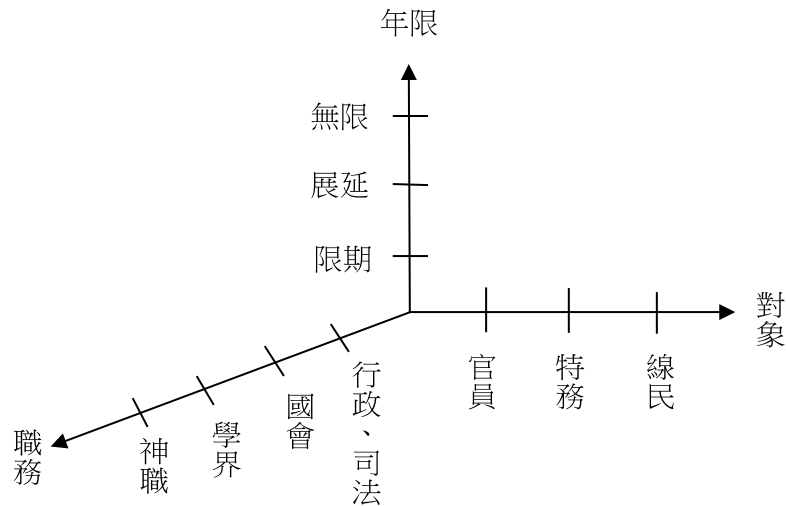


圖 1：政治洗滌運作的面向

在這裡，所謂的「國家組織」 (state organization) (§§ 1[1.f]) 包括大學、以及公立大學，也就是說，除了兩個最高研究院的院長，裡頭必須經過普選、或是經過學術評議會核准的主管，都必須接受洗滌，也就是主任、院長、以及校長 (§§ 1[3]) 。根據 David (2003: 427) 的揣測，應該是高等教育充斥馬列主義的意識形態，因此，希望能大刀闊斧、趁機轟轟烈烈從事社會改造一番。

比較特別的洗滌對象是所謂「壓制性國家機器」 (repressive apparatus) 的成員，該法規定根本不可以任職上述國家單位 (§§ 2-3) ，這些機構包括秘密警察、其相當層級的線民、共黨高層、國家安全部隊¹⁴ 的政治管理部門、民兵¹⁵、以及整肅委員會的委員；在 1948-89 年期間曾經前往蘇聯 KGB、

¹⁴ 國家安全部隊 (Corps of National Security, SNB) 包含穿制服的公安 (Public Security, VB) 、以及秘密警察，是在戰後成立，用來取代傳統的警察，聽命於捷共，並且在 1948 年的政變協助接收政府；在 1991 年，因為被揭露試圖鎮壓天鵝絨革命中的學生，因而被解散 (Wikipedia, 2016a) 。

¹⁵ 民兵 (People's Militias) 號稱「工人階級的武拳」，是捷共的民兵組織，原本是在接收

或其他政治安全大學訪問的學者或接受訓練的幹員也包含在內（David, 2003: 410-11）（表 1）。

就程序上而言，任何人如果已經任職、申請、或是受聘於上述職位，必須向內政部申請一張證明書，確認未曾當過秘密警察、或是其線民，同時，本人也必須繳交一份切結書¹⁶，聲明從未歸屬該法所盧列的其他單位（§§ 4[1]、4[3]）。如果申請人證實先前隸屬該法所列的單位，該單位必須終止聘僱關係、或是調往其他該法並未規範的職位¹⁷（§§ 18[2]）。另外，該法規定，除非當事人書面同意，證明書、或是相關事實不可以公開（§§ 19）。最後，如果當事人不服證明書所載，可以訴諸於法¹⁸。

表 1：洗滌法適用的對象

	領導者	積極成員	一般成員
特務組織	秘密警察幹部 秘密警察特別身分線民 蘇聯 KGB 出身幹員 政治、安全大學訓練出身	共黨高幹 國安部隊政治管理部 人民部隊軍官	不適用
違憲組織	整肅委員會成員	不適用	不適用
政府部門	不適用	不適用	不適用

來源：改自 David（2004: 794, 805）。

由捷克憲政法庭（Constitutional Court of the Czechoslovak Federal Republic, 1992）的判決書可以看到，截至 1992 年 9 月 7 日為止，政府總共發出 168,928 張洗滌證明，扣除 40,615 張有爭議的，其中有 11,363 份是證明有問題的（6.7%）。另外，根據內政部在 2001 年 3 月提供的一項統計，

政權後用來對抗右派游擊隊，隸屬內政部，後來在 1952 年改歸共黨，穿灰色制服；在 1980 年代末期，民兵人數將近四萬，主要的任務是使用盾牌驅離抗議的群眾，在 1989 年底因共黨倒台而解散（Wikipedia, 2016b）。

¹⁶ 大概有 25,000 公職人員必須填寫（David, 2003: 423）。

¹⁷ 此部分已經終止適用。

¹⁸ 根據洗滌上訴法庭在 2001 年公布，還是證實有 18 人的紀錄無誤，包括 4 名國會議員、以及 2 名政府高官（David, 2003: 423）。

大約發出 345,000 張證明，其中大約 3% 呈陽性¹⁹ (David, 2003: 413-14)。不過，就執行面而言，還是有很大改進的空間，譬如內政部長在 2001 年表示，許多情治人員非法取得「負面篩選」的證明，經過政府重新查核 150,000 張洗滌證明，發現 117 張不符事實，理由是輕描淡寫的「錯誤分析檔案」 (David, 2003: 421)。至於切結書，根據到 2001 年底為止的分析，6,689 張當中有 85 張造假，只有 315 人承認過去不光彩的紀錄 (David, 2003: 423)。

整體來看，捷克的洗滌工作並非包山包海。就垂直而言，除了司法單位，基本上是限定決策高層；至於水平來看，因為刻意縮小洗滌的層面，讓那些過去任職於「壓制性國家機器」的人四處流竄，特別是正在著手市場化的企業界，任由他們繼續肆虐，管理不善、缺乏透明、舞弊貪污、及公司倒閉等消息層出不窮，甚於公然違反聯合國的禁運。由於除了整肅委員會成員，洗滌的對象不包括共黨高層，所以，儘管權貴無法再仰賴捷共對於國家的控制，然而，他們還是可以透過企業捐款政黨的方式左右民主選舉，繼續延續支配。(David, 2003: 415-16)

肆、人權保障的爭議

有關於人權保障的關懷，大致上可以歸納為資訊問題、正當程序、就業歧視、以及忠誠問題²⁰ (Horne, 2009: 717)。首先，最基本的資訊問題是真相與隱私之間的平衡，也就是擔心洗滌會被拿來當作揭發個人資料的工具；當然，這並非相互排斥的選擇，牽涉到立法是否周延。在立法的過程，捷克政府認為隱私重於真相，甚至於在草案中還禁止揭露秘密警察、或線民的名字，違者最高可以罰刑三年，因為國會議員強烈反對作罷。由實際的經驗來看，由於洗滌證明是直接送達給申請人，除非本身同意，公家機構並不能對外公開結果，因此，外人不會知道同事離職的原委；另外，根

¹⁹ 也就是所謂的「陽性洗滌」(positive lustration)。不過，這是醫學的用法，特別是癌症的篩選，字義不免讓人誤解是沒有問題。

²⁰ 另外，請參考 Kosař (2008: 470-72) 的批判。

據『前國家安全單位資料存取法²¹』，每個人都可以看有關自己的紀錄，只不過，打小報告者的名字都用墨印蓋掉了，因此，除非自己刻意要告訴別人，受害者、或是第三者無從知道²²（David, 2003: 424）。第二個資訊問題是究竟這些秘密檔案的可信度如何，換句話說，是否可以相信這些特務²³所記載的資料，尤其是有些部門原本就會故意捏造事實，伺機毀陷異議份子、製造政治混亂。

正當程序是法治的起碼要求，尤其對於「回溯性正義」(retroactive justice) 的質疑，換句話說，這些特務所做的事在過去並未違法，不應該事後立法處罰。然而，在共產政權之下，國家機器是極權統治的工具，包括司法，連憲法都是參考用的，更何況寄望花瓶般的國會有相關的立法，國際上的法學專家並不絕對禁止回溯性立法²⁴（施正鋒，2014：33-36）。因此，課題轉向「追訴年限」（statutory limitations）原則，也就是如何計算追訴年限、以及是否可以延長年限、甚至於沒有期限？另外，上訴機制的有是否完備²⁵、資訊進用的不對稱，也是對於當事人權利保障所必要（Horne, 2009: 717）。

有關於就業歧視，最大的爭議是究竟政治理念不同是否可以當作就業排除的標準，相關的議題是洗滌的依據是否違反人民結社的自由。相對的價值觀則是，到底那些在邪惡政權下的幫兇、甚至於加害者，會不會忠於民主政權？會不會傷害到正在萌芽中的民主政治？如果只是坐擁高薪的肥貓事小，要是這些人運用過去的權力結構，轉往市場經濟興風作浪，豈不

²¹ *Act on the Disclosure of Files Created in the Course of Activities on the Part of the Former State Security Service, and Some Further Acts* (140/1996)，後來在 2002 年修正 (107/2002)。

²² 事實上，參議員打算修法，讓大家可以無限閱讀檔案，根據民調，52% 的受訪者贊成修法、20% 左右反對 (David, 2003: 424-25)。

²³ Naučlér (2006: 8) 稱之為「專業的騙子」。

²⁴ 參見 PACE (1992, para. 7) 的不同看法。另一種說法是洗滌並非刑事處罰，而是針對未來做行政處置，換句話說，這不是為了過去處罰報復、而是為了現在伸張正義，甚至於，這不只是在建構新的政治結構，而是在建構新的道德共同體 (Łoś, 1995: 118; Letki, 2002: 535; Welsh, 1996: 423; Ellis, 1996: 194-96)。

²⁵ 不過，共黨高層、以及大尾的線民沒有上訴的權利 (Sadurski, 2014: 236)。

是養癰遺患？萬一他們利用手中的秘密檔案操弄政治，是否會讓民主倒退、甚至於崩盤？

自從洗滌法通過後，一些不服人權被侵犯的捷克團體分別向歐洲理事會(Council of Europe)、以及國際勞工組織(International Labour Organization)提出控訴。對於歐洲理事會²⁶所提的人權侵犯控訴包括公平審判、個人隱私、家庭生活、自由表意、自由結社、有效救濟、以及反歧視(Horne, 2009: 720)，雖然歐洲人權法院並沒有針對捷克做出判例²⁷，歐洲理事會的大會²⁸(Parliamentary Assembly)在1992年通過一項決議〈拆解前共黨極權體制遺緒的方式〉(PACE, 1992)，嚴正聲明洗滌措施與民主國家是相容的，不過，必須符合些法治的原則，包括必須針對個人罪刑、正當程序(辯護、無罪推定、上訴等權利)、不得報復等原則(PACE, 1996)，基本上是肯定洗滌的對於民主化的正面意義。

另外，國際勞工組織²⁹從1992年起，幾乎每隔一、兩年，就針對捷克的洗滌法是否違反『反就業歧視公約』(1958)提出觀察報告(ILO, 1992a, 1992b, 1995, 1996, 1998, 2000, 2001, 2002, 2003, 2005, 2007, 2008, 2009, 2011, 2012, 2015)。捷克團體控訴的理由，大致上是不滿因為政治看法被限制就業、以及違反各種程序正義，並宣稱有百萬人受到影響(ILO, 1992a:

²⁶ 歐洲理事會在1953年通過『保護人權暨基本自由公約』(Convention for the Protection of Human Rights and Fundamental Freedoms)，設有專責的歐洲人權法院(European Court of Human Rights, ECtHR)，對於簽署國有約束力，由其最高權力機構部長會議(Committee of Ministers)監督執行情形，捷克是在1993年加入。

²⁷ 自從對於立陶宛所作的第一個判決*Sidabras and Dėiautas v. Lithuania* (2015)，也先後對解體後的斯洛伐克、波蘭、以及拉脫維亞等等國家有相關判例，包括*Turek v. Slovakia* (2006)、*Rainys and Gasparavičius v. Lithuania* (2005)、*Matyjek v. Poland* (2007)、*Bobek v. Poland* (2007)、以及*Ždanoka v. Latvia* (2006)，要求注意洗滌的妥適性。見Kosař (2008)的比較分析。

²⁸ 目前由47個會員國的324名代表組成，主要的任務是監督各國的人權保障措施，特別是協助前共黨國家的民主化。

²⁹ 國際勞工組織在1958年通過『反就業歧視公約』(Convention Concerning Discrimination in Respect of Employment and Occupation)，捷克在1993年簽署。另外，在1998年通過的『工作權基本原則宣言』(Declaration on Fundamental Principles and Rights at Work)，還特別強調結社的自由、以及消除就業歧視。

paras. 12-14)。國際勞工組織做了一些程序上的建議，包括實施期限，一方面建議捷克國會修法、或者加以廢除，另一方面則建議捷克憲政法庭介入釋憲（ILO, 1992a: paras. 105）。

由於有 99 名國會議員連署請願釋憲，捷克聯邦憲政法庭在 1992 年 11 月 26 日做出『洗滌一號判決』（PI, Ú S 1/92）（Constitutional Court of the Czechoslovak Federal Republic, 1992），認為在民主轉型的過程，基於公共利益的考量，也就是國家安全、以及捍衛民主優於請願者的基本權利³⁰，同意政府可以採取某些措施來防止共黨極權復辟，因此支持『大洗滌法』的絕大多數條文³¹。

值得一提的是原條文所列的洗滌對象「有意識的合作者／線民」（conscious collaborator）（§§ 2[1.c]），除了「地下的合作者／線民³²」（clandestine collaborator），還包括「候選者作者／線民」（candidate collaborator）（§§ 2[2]），也就是當事人很可能本身並不知道、卻被註記可以接洽者³³。捷克聯邦憲政法庭（Constitutional Court of the Czechoslovak Federal Republic, 1992）在判決書中詳細說明潛伏線民的運作、以及督導方式，認為把被看中的人也當幫兇是不合理的，因此認為這個條款、以及相關的獨立審查委員會條款（§§ 11）是不合宜的。

國會在 1995 年將洗滌法的適用延長五年，又乾脆在 2000 年取消年限，又有 44 名國會議員連署要求釋憲，捷克共和國憲政法庭在 2001 年 12 月 5

³⁰ 這種預防性（prophylactic）的主張，可能是沿用戰後德國所採用的「積極民主」（militant democracy）概念，也就是「民主安全化」（securitization of democracy）（Williams, 2003: 2, 9）。

³¹ 在原来的條文，國防部長、以及內政部長可以因為「重大國家安全利益」而豁免（§§ 2[3]、§§ 3[2]），被判為違憲。

³² 原文是 as a resident, agent, or occupier of an apartment lent to the State Security Service, or used as a place conspiracy, an informer, or an ideological collaborator of the Security Service（§§ 2[1.b]）（Chmielewski, 2010: 100）。不過，根據 Kosař（2008: 464），線民分為三級，A 級是指正式的探員，B 級是指非正式、但是可以信任的有意識合作者，C 級則是打算吸收者。

³³ 根據判決書（Constitutional Court of the Czechoslovak Federal Republic, 1992）的可以看到，到 1992 年 9 月 7 日為止，在政府已發出 168,928 張洗滌證明當中，這一類有 4,061 張（2.4%）。

日做出『洗滌二號判決』(PI, Ú S 9/01) (Constitutional Court of the Czech Republic, 2001)，大致維持『洗滌一號判決』的觀點，也就是洗滌機制的存在是用來保護公共利益，同時宣判洗滌年限的廢除並未違憲，理由是民主國家為了保護國民的安全、以及確保民主的發展，可以要求官員效忠國家，並不限於民主轉型之際。

伍、檢討

根據 2000 年的一份民調，32% 的受訪者認為洗滌有利於民主的發展，不過，也有 27% 持相反看法；至於是否改善公家機構、以及企業的人事情況，27% 同意、30% 反對 (David, 2003: 413-14)。其實，選民比較關心的是候選人過去是否為特務、或是線民，然而，捷克的洗滌法並沒有強制個人自清，只規定政黨可以要求自己的候選人提供洗滌證明書，因此，有些政黨從善如流、有些則置之不理 (David, 2003: 415-16)。由於捷克的洗滌對象不限公職人員、還包括共黨要員因此，相對其他中、東歐國家，算是比較早嘗試剷除原來的權力網絡；只不過，這些權貴很快地就知道如何調適，馬上又建立了新的網絡，因此，在捷克走向經濟市場化的過程，他們又可以上下其手，特別是武器銷售 (David, 2003: 431)。

基本上，在實施洗滌之後，民主化初期政客互控對手為線民的情況已經大為降低。在 1992 年國會大選之前，秘密警察線民的名單初步公布，又經過 1999 年的增補、而且可以上網查得到，選前的爆料抹黑、打擊政敵相對上比較困難。當然，還是不時會有秘密檔案違法出現，明顯針對特定對象³⁴。由於檔案記載未必都是事實，特別是特務有可能刻意變造，當時總統 Havel 便表示，這些洩漏出來的紀錄「會造成無可測定的人間悲劇」，令人

³⁴ 譬如民主化後擔任過外交部長、副總理、以及議長的 Jan Kavan，在 1991 被指控於 1969-70 年期間當過線民，終於在 1996 年獲得司法洗清，不過，傳言說他之所以會謠言纏身，真正的理由是他反對總理 Vaclav Klaus (1993-98) 的經濟政策；另一名政治人物 Vaclav Vales 就沒有那麼幸運，後來被迫辭去國會議員職位 (David, 2003: 419-20; Wikipedia, 2016c; Olson, 2013-14: 7)。

費解的是，他自己對於這些檔案也是半信半疑；亡羊補牢的作法是配套的『機密保護法³⁵』、以及『資訊自由法³⁶』，特別是處罰流出單位的主管(David, 2003: 419)。

有關於跟秘密警察「合作」(collaboration)的定義，究竟虛與委蛇是否可以當作共犯？如果是在脅迫之下同意擔任線民，是否罪惡的程度跟特務一樣？甚至於，有些人只是被接觸、卻嚴正拒絕，是否因為有被認為被吸收的「潛力」，就在道德上有瑕疵？因為牽涉到極權統治下的人性，一些捷克知識份子民主化後堅決反對洗滌的作法，認為大家畢竟都是受害者，如果只怪個人、不去追究共產制度的邪惡，未必公允；然而，話又說回來，如果把所有罪過都怪制度，那又便宜了那些主動投懷送抱、或是無法抵擋誘惑的共犯。

³⁵ 正式名稱為 *Act on the Protection of Classified Information* (412/2005)。

³⁶ 正式名稱為 *Freedom of Information* (106/1999)。

附錄 1 : 捷克洗滌證書申請表英文翻譯³⁷

(Czech Lustration Certificate Request Form - English Translated Copy)

STAMP

(200 Crown – Administrative Fee)

REQUEST

In the issue

pertaining to acquiring an lustration certificate within the
framework of § 8 Act No. 451/1991 Sb.

Title, First Name, Surname:

Any previous Names and/or Surnames:

Date of Birth:

Place of Birth:

Residential Phone Number:

Residential Address:

Zip Code:

This also declares that I am bearer of citizenship of the Czech Republic.

Date:

(Official Signature of the Applicant)

Application should be sent to:

Ministry of Interior, P.O. BOX 627, 170 00 Prague 7

³⁷ 來源 : Chmielewski (2010: 80, Appendix 2) 。

附錄 2：捷克轉型正義相關法律³⁸

Act No. 119/1990 Coll. on Judicial Rehabilitation

Act No. 403/1990 Coll. on the Mitigation of Consequences of Some Property Violations

Act No. 212/1990 Coll. on the Revocation of Immovable Property of the State in the Long-time Use of the Communist Party of Czechoslovakia

Act No. 497/1990 Coll. on the Reversion of Property of the Socialist Youth Organization to the People of the Czech and Slovak Federative Republic

Act No. 496/1990 Coll. on the Return of Property of the Communist Party of Czechoslovakia to the People of the Czech and Slovak Federal Republic

Act no. 119/1990 Coll., on Judicial Rehabilitation

Act No. 451/1991 Coll., Establishing Additional Conditions for the Execution of Some Functions in State Bodies and Organizations of the Czech and Slovak Federal Republic, Czech Republic and Slovak Republic (Big Lustration Law)

Act No. 87/1991 Coll. on Extra-judicial Rehabilitation

Act No. 279/1992 Coll. on Some Additional Prerequisites for the Execution of Some Functions Occupied by Appointed or Nominated Servicemen of the Police of the Czech Republic and the Prison Service of the Czech Republic

Act No. 198/1993 Coll. on the Unlawfulness of the Communist Regime and Resistance against It

Act No. 217/1994 Coll. on the Provision of a Onetime Monetary Sum to Certain Victims of Nazi Persecution

Act No. 165/1997 Coll. on the Payment of Nonrecurring Compensation towards the Mitigation of Some Injustices Wrought by the Communist Regime

Act No. 106/1999 Coll. Freedom of Information

Act No. 212/2000 Coll. on the Mitigation of Certain Property Injustices Caused by the Holocaust

Act No. 107/2002 Coll., Amending Act No. 140/1996 Sb. on the Disclosure of Files Created in the Course of Activities on the Part of the Former State Security Service, and Some Further Acts

³⁸ 來源：Spanish National Research Council（2013），略加增減。

Act No. 218/2002 Coll., on Service of Public Servants in Administrative Authorities and on Remuneration of Such Servants and Other Employees in Administrative Authorities

Act No. 203/2005 Coll. on the Compensation of Certain Victims of the Military Occupation of Czechoslovakia by the Union of Soviet Socialist Republics, German Democratic Republic, Polish People's Republic, Hungarian People's Republic and Bulgarian People's Republic

Act No. 357/2005 Coll. on the Acknowledgment of Participants in the National Struggle for the Formation and Liberation of Czechoslovakia and Certain of Their Survivors, on Extra Contribution to the Pensions of Certain Persons, on a Onetime Monetary Sum to Certain Participants in the National Struggle for Liberation in the Years 1939 to 1945 and on the Amendment of Certain Acts

Act No. 412/2005 Coll. on the Protection of Classified Information

Act No. 181/2007 Coll. on the Institute for the Study of Totalitarian Regimes and the Security Services Archive, and on Amendments to Some Acts

Act No. 262/2011 Coll. on the Participants in Anti-communist Opposition and Resistance

附錄 3：捷克『大洗滌法』（1991）³⁹

451/1991 Coll.

ACT of 4th October 1991

Determining Some Further Prerequisites for Certain Positions in State Bodies and Organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic

Amendment: NA03/1992

Amendment: 555/1992 Coll.

Amendment: 254/1995 Coll.

Amendment: 422/2000 Coll.

Amendment: 147/2001 Coll.

Amendment: 151/2002 Coll., 312/2002 Coll.

Amendment: 413/2005 Coll.

The Federal Assembly of the Czech and Slovak Federative Republic has resolved to pass the following Act:

Section 1

- (1) This Act determines some further prerequisites for certain positions filled by election, designation or appointment
- a) in bodies of state administration of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic;
 - b) in the Czechoslovak Army;
 - c) in the Federal Security Information Service, the Federal Police Force, the Castle Police Force;
 - d) in the Office of the President of the Czech and Slovak Federative Republic, the Office of the Federal Assembly, the Office of the Czech National Council, the Office of the Slovak National Council, the Office of the Government of the Czech and Slovak Federative Republic, the Office of the Government of the Czech Republic, the Office of the Government of the Slovak Republic, the Office of the Constitutional Court of the Czech and Slovak Federative Republic, the Office of the Constitutional Court of the Czech Republic, the Office of the Constitutional Court of the Slovak Republic, the Office of the Supreme Court of the Czech and Slovak Federative Republic, the Office of the Supreme Court of the Czech Republic, the

³⁹ 來源：Institute for the Study of Totalitarian Regimes（2015）。請比較 Chmielewski（2010: 99-106）有關於未經修正過的版本。

- Office of the Supreme Court of the Slovak Republic, in the Presidium the Czechoslovak Academy of Sciences and the Presidium of the Slovak Academy of Sciences and at the Supreme Administrative Court;
- e) in the Czechoslovak Radio, the Czech Radio, the Slovak Radio, the Czechoslovak Television, the Czech Television, the Slovak Television, the Czechoslovak Press Agency of the Czech Republic and the Czechoslovak Press Agency of the Slovak Republic;
 - f) in state enterprises, state organizations, joint stock companies where the state is the majority shareholder, foreign trade corporations, in the state organization Czechoslovak State Railways, state funds, state monetary institutions and the State Bank of Czechoslovakia;
 - g) in offices of territorial self-governing units; unless stipulated otherwise below.
- (2) Positions under section 1(1) b) in the Czechoslovak Army and at the Federal Ministry of Defence mean positions with the highest achievable ranks of Colonel and General and the positions of military attaches.
- (3) Positions under section 1 (1) f) mean positions of the head of an organisation and senior officers directly subordinate to him/her. At universities and public universities 5) these posts mean also the positions of elected academic officials and positions approved by the Academic Senate of the university and faculty. Positions under paragraph (1) g) mean the positions of a head of the authority and senior officers.
- (4) This Act also determines some further prerequisites for the positions of a judge, lay judge, prosecutor, prosecution investigator, notary public, state arbiter and for persons serving as trainee judges, trainee prosecutors, trainee notaries public and arbitration trainees.
- (5) This Act also determines the conditions of reliability to allow the operation of some licensed businesses. 1)

Section 2

- (1) A prerequisite for a position as referred to in section 1 is that during the period from 25/2/1948 to 17/11/1989 the citizen was not:
- a) an officer of the National Security Corps assigned to the State Security Service;
 - b) registered in the State Security Service' s files as a resident, agent, lent apartment holder, conspiracy apartment holder, informer or ideological collaborator of the State Security Service;
 - c) (expired)

- d) a Secretary of a body of the Communist Party of Czechoslovakia or the Communist Party of Slovakia from the level of a District Committee or an equivalent committee upwards, a member of the presidium of these committees, member of the Central Committee of the Communist Party of Czechoslovakia or the Central Committee of the Communist Party of Slovakia, a member of the Bureau for the Management of Party Work in the Czech Lands or a member of the Committee for the Management of Party Work in the Czech Lands, except for those holding these posts only in the period from 1/1/1968 to 1/5/1969;
 - e) an employee of the system of structures as referred to in d) in a department in charge of the political running of the National Security Corps;
 - f) a member of the People' s Militias;
 - g) a member of the National Front Action Committee after 25/2/1948, vetting commissions after 25/2/1948 or vetting and normalization commissions after 21/8/1968;
 - h) a student at Felix Edmundovic Dzerzinsky University of the Council of Ministers of the USSR for officers of the State Security Service, the University of the Ministry of the Interior of the USSR for officers of the Public Security Service, the Political College of the Ministry of the Interior of the USSR, or a postgraduate or a participant in courses lasting longer than 3 months at these schools.
- (2) expired
(3) expired

Section 3

- (1) A prerequisite for positions under section 1 at the Federal Ministry of the Interior, Federal Security Information Service, Federal Police Force and the Castle Police Force is that during the period from 25/2/1948 to 17/11/1989 the citizen was not a) an officer of the National Security Corps assigned to a counterintelligence unit in the State Security Service;
- b) assigned to the State Security Service holding the post of a Chief of Department or higher; c) a student at Felix Edmundovic Dzerzinsky University of the Council of Ministers of the USSR for officers of the State Security Service, the University of the Ministry of the Interior of the USSR for officers of the Public Security Service, the Political College of the Ministry of the Interior of the USSR, or a postgraduate or a participant in courses lasting longer than 3 months at these schools;
- d) in the National Security Corps at the post of a Secretary of the Main Committee of the Communist Party of Czechoslovakia or the Main Committee of the Communist

Party of Slovakia, a member of the Main Committee of the Communist Party of Czechoslovakia or the Main Committee of the Communist Party of Slovakia, a member of a Unit Committee* of the Communist Party of Czechoslovakia or a Unit Committee* of the Communist Party of Slovakia, or an officer of the National Security Corps assigned to the Department for Political Training and Educational, Cultural and Propaganda Activities of the Federal Ministry of the Interior;

- e) a person as referred to in section 2 (1) b) through g).
- (2) expired.

Section 4

- (1) The citizen shall prove the facts as referred to in section 2 (1) a) and b) with a certificate issued by the Federal Ministry of the Interior.
- (2) expired
- (3) The citizen shall prove the facts as referred to in section 2 (1) d) through h) with an affidavit.
- (4) expired

Section 5

The citizen who is to hold a position in a body or organization as referred to in section 1 shall submit the certificate, affidavit or finding, as the case may be, to the head of this body or organization. The application for the certificate to be issued by the Federal Ministry of the Interior shall be lodged by the citizen, unless stipulated otherwise below.

Section 6

- * The general term Unit refers here mostly to district and regional directorates etc. (trans. note)
- (1) Instead of the citizen who is to hold a position in a body or organization as referred to in section 1 or a citizen who is holding such a position on the date this Act becomes effective, the subject to apply to the Federal Ministry of the Interior for the certificate shall be:
 - a) for a citizen elected to such a position, the body competent to carry out the election;
 - b) for a citizen designated to such a position, the body competent to designate the citizen to such a position;
 - c) for a citizen appointed to such a position, the body competent to carry out the appointment. At the same time, the head of the body or organization shall inform

- this citizen of his or her duty to submit the certificate within 30 days of its delivery.
- (2) The application for a certificate made for a citizen who is holding a position as referred to in section 1 on the date this Act becomes effective must be sent to the Federal Ministry of the Interior within 30 days of the date this Act becomes effective.
 - (3) The Federal Ministry of the Interior shall send the certificate to the citizen concerned within 60 days of the date of delivery of the application and at the same time notify thereof the subject which has applied for the issuance of the certificate.
 - (4) If the citizen who is holding a position as referred to in section 1 on the date this Act becomes effective fails to submit the certificate to the head of the body or organization within 30 days of its receiving, the head of the body or organization shall request within seven days the Federal Ministry of the Interior for sending a duplicate of that certificate.

Section 7

- (1) The President of the Czech and Slovak Federative Republic, the Presidium of the Federal Assembly, the Presidium of the Czech National Council, the Presidium of the Slovak National Council, the Government of the Czech and Slovak Federative Republic, the Government of the Czech Republic and the Government of the Slovak Republic, the Prosecutor General of the Czech and Slovak Federative Republic, the Prosecutor General of the Czech Republic and the Prosecutor General of the Slovak Republic shall apply to the Federal Ministry of the Interior for a certificate on persons to hold positions established by appointment for which they enjoy this right under special provisions. The Federal Ministry of the Interior must grant this application without delay.

Section 8

- (1) Any citizen aged 18 and over is entitled to apply to the Federal Ministry of the Interior for the certificate under section 2 (1) a), b) and c), or a finding under section 13, as the case may be.
- (2) An application for the certificate must be accompanied with a CZK 200 duty stamp and an authenticated signature of the applicant.

Section 9

- (1) The certificate shall be issued by the Federal Ministry of the Interior, which shall deliver it in the citizen's own hands; this shall not apply for certificates issued

under section 7.

- (2) If documents to support the issuance of the certificate are owned by another state body, this body, upon the request from the Federal Ministry of the Interior, must within seven days provide this Ministry with all the documents and other information necessary for the issuance of the certificate.

Section 10

For the purposes of this Act and for the purposes of court proceedings, the certificate, the finding and the data contained therein shall not constitute classified information.

Section 11

expired

Section 12

expired

Section 13

expired

Section 14

- (1) If the citizen fails to satisfy the prerequisites as referred to in section 2, his or her employment shall terminate by a notice of dismissal served by the organization concerned within 15 days of the date when the organization learnt this fact, unless the employment terminates by mutual agreement or in another manner on an earlier date or unless the citizen is assigned to another position than the one as referred to in section 1.
- (2) The provision of paragraph (1) shall apply accordingly to the termination of service by dismissal 2) if the citizen fails to satisfy the prerequisites for his or her position as referred to in section 3.
- (3) If the citizen has refused to make an affidavit of the facts as referred to in section 2 (1) d) through h), or if the affidavit is not true, paragraphs (1) or (2) shall be applied.

Section 15

If a prosecutor or prosecution investigator fails to satisfy the prerequisites for his or her position as referred to in section 2, this fact shall be a reason for terminating his or

her employment.

Section 16

Under the conditions as referred to in section 14 (1), the competent body shall file a motion to remove the judge or lay judge from his or her position.

Section 17

The provisions of the Labour Code allowing an organization to give a notice of dismissal only upon a previous consent from the relevant trade union body 3) shall not apply to the termination of employment under sections 14 and 15.

Section 18

expired

Section 19

It is forbidden to publish any facts contained in the certificate or finding or to publish the certificate or finding itself, as well as to publish any of the documents supporting the issuance without a previous consent from the citizen.

Section 20

The provisions of section 1 through 3 shall not apply to citizens born after 1 December 1971. These citizens shall not be required to submit the certificate or affidavit under section 4 hereof.

Section 21

- (1) Publishers of press periodicals and licensed operators of radio and television broadcasting, news agencies and audiovisual programmes may for themselves or for their employee who is involved in forming the content production of the above media, upon his or her previous written consent, apply to the Federal Ministry of the Interior for issuing a certificate or a commission for issuing a finding; provisions of section 6 (3), section 9 (1), sections 10, 12, 13, section 18 through 20 thereof shall apply accordingly for these purposes.
- (2) Presidents or equivalent representatives of political parties, political movements and associations 4) may for themselves or for a member of the management of their political party, political movement or association, upon his or her previous written consent, apply to the Ministry of the Interior for issuing a certificate or a

commission set up under section 11 for issuing a finding. The provisions of paragraph (1) shall apply accordingly to these relationships.

Section 22

- (1) Should Acts of the National Councils empower the Ministers of the Interior and the Ministers of Justice of the Czech Republic and the Slovak Republic to ascertain facts as referred to in section 2 (1), the Federal Ministry of the Interior and the Commission must grant their applications for a certificate or finding.
- (2) Termination of service of officers of the Penitentiary Service of the Czech Republic and the Corps of Prison and Court Guards of the Slovak Republic and officers of the Police of the Czech Republic and of the Police Force of the Slovak Republic shall be governed by Acts of the National Councils.

Section 23

This Act shall become effective on the date of promulgation.

Havel signed

Battěk signed

Vice Chairman of the Federal Assembly of the CSFR Čalfa signed

附錄 4：捷克『小洗滌法』（1992）⁴⁰

279/1992 Coll.

**ACT of the Czech National Council of 28 April 1992
on Some Further Prerequisites for Certain Positions Filled by Appointment
or Designation of Officers of the Police of the Czech Republic and Officers
of the Penitentiary Service of the Czech Republic**

Amendment: 555/1992 Coll.

Amendment: 256/1995 Coll.

Amendment: 424/2000 Coll.

Amendment: 35/2002 Coll.

Amendment: 362/2003 Coll.

The Czech National Council has resolved to pass the following Act:

Section 1

This Act determines some further prerequisites for certain positions filled by appointment or designation

- a) in the Ministry of the Interior of the Czech Republic (hereinafter referred to as “the Ministry”);
- b) in the Police of the Czech Republic;
- c) in the Penitentiary Service of the Czech Republic.

**Prerequisites for certain positions in the Ministry and the Police of
the Czech Republic**

Section 2

(1) Positions under section 1 a) and b) mean positions of

- a) officers of the Police of the Czech Republic (hereinafter referred to as “police officer”) called to fulfill tasks in the Ministry; 1)
- b) police officers assigned to the Office of Investigation of the Czech Republic;
- a) police officers assigned to a Police Directorate;
- b) Director, Deputy Director, Commissioner, Commander of External Service*, Head of Administrative Service Department and Chief Inspector at the District and equivalent Metropolitan District and Municipal Directorates of the Police of the

⁴⁰ 來源：Institute for the Study of Totalitarian Regimes（2015）。

Czech Republic;

- c) Director, Deputy Director, Chief Commissioner, Commander of External Service, Head of Department, Commander of a SWAT Team, Chief of Administrative Service Department, Chief of Section, Chief Senior Specialist and Senior Specialist at the Regional Police Headquarters in the Czech Republic and the Capital Prague Police Headquarters;
 - d) Director, Deputy Director, Chief of Department and Senior Investigator at the Regional Offices of Investigation in the Czech Republic and the Capital Prague;
 - * Uniformed Police (trans. note)
 - e) Director, Deputy Director and Chief of Department at the District and equivalent Metropolitan District and Municipal Offices of Investigation in the Czech Republic.
- (2) Positions mean the positions as referred to in paragraph 1 a) through g) or equivalent positions.
- ** The general term Unit refers here mainly to district and regional directorates etc. (trans. note)
- (3) Positions under paragraphs (1) and (2) mean service positions under a special Act. 1a)

Section 3

- (1) A prerequisite for a position as referred to in section 2 is that during the period from 25/2/1945 to 17/11/1989 the citizen was not
- a) an officer of the National Security Corps assigned to a counterintelligence unit in the State Security Service;
 - b) an officer of the National Security Corps assigned to the State Security Service holding the position of a Chief of Division and higher;
 - c) registered in the State Security Service's files as a resident, agent, lent apartment holder, conspiracy apartment holder, informer or ideological collaborator of the State Security Service;
 - d) repealed
 - e) a Secretary of a body of the Communist Party of Czechoslovakia or the Communist Party of Slovakia from the level of a District Committee or an equivalent committee upwards, a member of the presidium of these committees, member of the Central Committee of the Communist Party of Czechoslovakia or the Central Committee of the Communist Party of Slovakia, a member of the Bureau for the Management of Party Work in the Czech Lands or a member of the Committee for the Management of Party Work in the Czech Lands, except for those holding these posts only in the

period from 1/1/1968 to 1/5/1969;

- f) in the National Security Corps holding the post of a Secretary of the Main Committee of the Communist Party of Czechoslovakia or the Main Committee of the Communist Party of Slovakia, a member of the Main Committee of the Communist Party of Czechoslovakia or a the Main Committee of the Communist Party of Slovakia, a member of the Unit Committee** of the Communist Party of Czechoslovakia or the Unit Committee** of the Communist Party of Slovakia;
 - g) an employee of the system of structures as referred to in e) and f) in a department in charge of the political running of the National Security Corps;
 - h) an officer of the National Security Corps assigned to the Department for Political Training and Educational, Cultural and Propaganda Activities of the Federal Ministry of the Interior or the Ministry who was directly involved in the political training
 - i) an officer of the National Security Corps assigned to the position of a Deputy Chief (Commander) for Political Training and Education
 - j) a member of the People's Militias;
 - k) a member of the National Front Action Committee after 25/2/1948, vetting commissions after 25/2/1948 or vetting and normalization commissions after 21/8/1968;
 - l) a student at Felix Edmundovic Dzerzinsky University of the Council of Ministers of the USSR for officers of the State Security Service, the University of the Ministry of the Interior of the USSR for officers of the Public Security Service, the Political College of the Ministry of the Interior of the USSR and other security schools in the USSR, or a postgraduate or a participant in courses lasting longer than 3 months at these schools.
- (2) Another prerequisite for positions under section 2 is that no facts as referred to in section 5 (1) c) and d) have been ascertained with respect to the citizen.

Prerequisites for certain positions in the Penitentiary Service of the Czech Republic Section 4

- (1) Positions under section 1 c) mean positions of
 - a) officers of the Penitentiary Service of the Czech Republic (hereinafter referred to as “penitentiary officer”) assigned to the Directorate of the Penitentiary Service of the Czech Republic;
 - b) Director and Deputy Director of a Department of the Penitentiary Service of the

Czech Republic or an organizational unit of the Penitentiary Service of the Czech Republic placed on the same level as a Department of the Penitentiary Service of the Czech Republic;

- c) Head of Division and of equivalent organizational units within the Departments of the Penitentiary Service of the Czech Republic, Head of Section (Group) in the organizational units of the Penitentiary Service of the Czech Republic equivalent in level to a Department of the Penitentiary Service of the Czech Republic;
 - d) Penitentiary officers assigned to Prevention Divisions (Groups) within the Departments of the Penitentiary Service of the Czech Republic.
- (2) Positions under section 1 mean service positions under a special Act. 1a)

Section 5

- (1) A prerequisite for positions under section 4 in the Penitentiary Service of the Czech Republic is that during or for the period from 25 February 1948 to 17 November 1989
- a) no facts as referred to in section 3 (1) have been ascertained with respect to the citizen;
 - b) the citizen was not a member of a Department Committee of the Communist Party of Czechoslovakia at the Correction Corps Administration of the Czech Republic, a member of a Department Committee of the Communist Party of Czechoslovakia in Departments and equivalent organizational units of the Correction Corps of the Czech Republic or a Chair of a Basic Unit of the Communist Party of Czechoslovakia in the Departments of the Correction Corps of the Czech Republic where no Department Committee of the Communist Party of Czechoslovakia was established;
 - c) the citizen did not hold the position of a Deputy Chief of the Headquarters or a Department of the Correction Corps of the Czech Republic in charge of political training;
 - d) the citizen did not hold the position of a Head of Division or Section or a Head of the Group of Internal Protection of the Correction Corps of the Czech Republic;
 - e) the citizen was not registered in the files of the Correction Corps of the Czech Republic as a resident, agent or confidant of the Internal Protection of the Correction Corps of the Czech Republic.
- (2) repealed.

Certificate and affidavit

Section 6

- (1) The facts as referred to in section 3 (1) a) through d) shall be proved by a certificate issued by the Federal Ministry of the Interior, or a finding issued under a special Act. 2)
- (2) The facts as referred to in section 3 (1) e) through g), j) and k) and in section 5 (1) b) through e) shall be attested by an affidavit.

Section 7

A citizen, police officer or penitentiary officer who is to hold a position as referred to in section 2 in the Ministry or within the Police of the Czech Republic or a position as referred to in section 4 in the Penitentiary Service of the Czech Republic shall submit a certificate, or a finding or affidavit, as the case may be, to the respective body; at the same time, before commencement of the position, he or she must submit an affirmation that he or she neither is nor was a collaborator of any foreign intelligence or counterintelligence service.

Section 8

- (1) The Minister of the Interior of the Czech Republic and the Minister of Justice of the Czech Republic are entitled to apply with the bodies specified in a special Act for a certificate or finding of facts as referred to in section 3 (1) a) through d). 3)
- (2) The Minister of the Interior of the Czech Republic and the Minister of Justice of the Czech Republic may authorize the body responsible for the appointment of a police officer, penitentiary officer or citizen who has been or is to be appointed to the position to apply for the certificate or finding under section 1.
- (3) At the same time, the head of the body or the body shall inform the police officer, penitentiary officer or citizen that he or she must submit the certificate or finding within 30 days of its receiving.
- (4) The application for the certificate regarding a police officer or penitentiary officer must be sent to the Federal Ministry of the Interior within 30 days of the date this Act becomes effective.
- (5) If the police officer or penitentiary officer fails to submit the certificate to the head of the body or to the body within 30 days of its receiving, the head of the body or the body shall request the Federal Ministry of the Interior for sending a duplicate of that certificate.

Termination of service and transfer to a different position

Section 9

- (1) If a police officer or penitentiary officer fails to satisfy the prerequisites for a position as referred to in section 3 (1) a) through e) and section 5 (1) b) through e), this shall be considered a reason for terminating service by a discharge. 4) The relevant body shall decide on the discharge of the police officer or penitentiary officer from the service within 15 days of learning the reason for discharge.
- (2) If a police officer or penitentiary officer fails to satisfy the prerequisites for a position as referred to in section 3 (1) f) through l), this shall be considered a reason for his or her transfer to another position than that as referred to in sections 2 and 4.
- (3) At discharge, the service terminates upon the lapse of two calendar months following the date of notification of the discharge decision, unless the relevant body and the police officer or penitentiary officer agree on a shorter period.
- (4) If the police officer or penitentiary officer who fails to satisfy the prerequisites for the positions as referred to in section 3 (1) and section 5 (1) asks for discharge from the service⁵⁾, the service terminates upon the lapse of two calendar months following the date of delivery of the request for discharge, unless the relevant body and the police officer or penitentiary officer agree on a shorter period.
- (5) If the police officer or penitentiary officer refuses to submit an affidavit of the facts as referred to in section 3 (1) and section 5 (1) b) through e) and section 7 within 60 days of the date this Act becomes effective or if the affidavit is not true, paragraph (1) shall be applied.

Common and final provisions

Section 10

Unless otherwise stipulated herein, the conditions and manner of issuing certificates and findings, their delivery and the verification of facts, publication, classifying, sanctions and court jurisdiction for reviewing the findings shall be governed by the provisions of a special Act. 6)

Section 10a

The provisions of this Act shall not apply to citizens born after 1 December 1971.

Section 10b

The provisions of this Act, with the exception of section 2, section 3 (1) a), b), f), h) and i) and (2), and sections 4 and 5, shall be applied when determining some

further prerequisites for the appointment or designation to service positions within the Fire and Rescue Service of the Czech Republic, the Customs Administration of the Czech Republic, the Security Information Service and the Office for Foreign Relations and Information accordingly, with a further prerequisite for a position being that during the period from 25 February 1948 to 17 November 1989 the citizen was not:

a) in the case of the appointment or designation to a service position of an officer of the Security Information Service or the Office for Foreign Relations and Information,

1. an officer of the National Security Corps assigned to a counterintelligence unit within the State Security Service;

***The general term Unit refers here mostly to district and regional directorates etc. (trans. note)

2. assigned to the State Security Service holding the position of a Chief of Department and higher;

3. in the National Security Corps holding the post of the Secretary of the Main Committee of the Communist Party of Czechoslovakia or the Main Committee of the Communist Party of Slovakia, a member of the Main Committee of the Communist Party of Czechoslovakia or the Main Committee of the Communist Party of Slovakia, a member of a Unit Committee*** of the Communist Party of Czechoslovakia or a Unit Committee*** of the Communist Party of Slovakia or an officer of the National Security Corps assigned to the Department for Political Training and Educational, Cultural and Propaganda Activities of the Federal Ministry of the Interior;

b) in the case of the appointment or designation to a senior service position in the Fire and Rescue Service of the Czech Republic or the Customs Administration, an officer of the National Security Corps assigned to the State Security Service.

Section 11

This Act comes becomes effective on 1 June 1992.

Bure.ova signed

Pithart signed

附錄 5：節錄捷克憲政法庭針對『大洗滌法』釋憲文 (1992)⁴¹

A democratic state has not only the right but also the duty to assert and protect the principles upon which it is founded, thus, it may not be inactive in respect to a situation in which the top positions at all levels of state administration, economic management, and so on, were filled in accordance with the now unacceptable criteria of a totalitarian system. Of course, a democratic state is, at the same time, entitled to make all efforts to eliminate an unjustified preference enjoyed in the past by a favored group of citizens in relation to the vast majority of all other citizens where such preference was accorded exclusively on the basis of membership in a totalitarian political party and where, as was already inferred earlier, it represented a form of oppression and discrimination in regard to these other citizens.

In a democratic society, it is necessary for employees of state and public bodies (but also of workplaces which have some relation to the security of the state) to meet certain criteria of a civic nature, which we can characterize as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged, a situation which can be found, without a great deal of difficulty, in other legal systems as well (for example, in the Federal Republic of Germany, persons from the former German Democratic Republic or the east bloc may not be engaged by firms producing highly developed technology for the weapons industry.)

In comparison with the situation that existed during the communist regime, where all the top positions at all levels were filled not only in contradiction to democratic principles and international norms, but also at variance with the regime's own (hence, domestic) laws, the statute under consideration affects only a very limited group of employees, exclusively in the power, administrative, and economic apparatus, and it affects licensed trades which are or could be the source of certain risks, be it merely from the perspective of protecting the establishment of democracy and its principles, the security of the state, or the protection of state secrets or of those positions from which it is possible, either overtly or covertly, to influence the development of society and the desirable performances of jobs in individual bodies or organizations.

In addition, the conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished (by 31 December

⁴¹ 來源：Czechoslovak Constitutional Court (2001)。

1996).

As a result of the considerations mentioned above, the Court is convinced that it cannot deny the state's right, if in conformity with the international commitments it has undertaken, to lay down in its domestic law conditions or prerequisites crucial for the performance of leadership or other decisive positions if, in which conditions or prerequisites, as was already referred to above, its own safety, the safety of its citizens and, most of all, further democratic developments are taken into consideration when setting the conditions or prerequisites.

If compared with the preceding legal order, these conditions might appear to be, from a formal perspective, a restriction on civil rights; however, in the current legal order the basic criteria, which will serve as the guide for our actions in the future, are those found in the Charter and its introductory act. (23/1991 Coll.).

In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria. Even the statute now under consideration, Act No. 451/1991 Coll., was based on them. It cannot be understood as revenge against particular persons or groups of persons, nor as discrimination against persons who, acting contrary to generally recognized principles either alone or in cooperation with or through a repressive body, had violated fundamental human rights and basic freedoms as they are understood and professed in a democratic society.

The statute under consideration does not even discriminate against such persons (neither in employment nor in their profession), it merely provides (and strictly for the future) certain additional preconditions for those positions designated as crucial by law, or for engaging in a licensed trade, particularly those linked with the possession of a firearm, of ammunition, of especially dangerous poisons, or with access thereto.

Such generally prescribed conditions do not, therefore, offend against either constitutional acts or international conventions. Each state or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

The law-based state which, after the collapse of totalitarianism, is tied to the democratic values enthroned after the collapse of totalitarianism, cannot in the final analysis be understood as amorphous with regard to values. With the adoption of the Charter of Fundamental Rights and Basic Freedoms as part of our legal system

fundamentally changed the nature and the value system of our entire constitutional and legal order changed fundamentally.

Constitutional acts, statutes and other legal enactments, as well as the interpretation and application of them, must conform to the Charter of Fundamental Rights and Basic Freedoms (§ 1 para. 1 of the Introductory Act 23/1991 Coll.). Thus, an entirely new element of the renaissance of natural human rights was introduced into our legal order, and a new foundation for the law-based state was established in this way.

Thus, the concept of the law-based state does not have to do merely with the observance of any sort of values and any sort of rights, even if they are adopted in the procedurally proper manner, rather it is concerned first and foremost with respect for those norms that are not incompatible with the fundamental values of human society as they are expressed in the already referred to Charter of Fundamental Rights and Basic Freedoms.

Finally, from this perspective not even the principle of legal certainty can be conceived in isolation, formally and abstractly, but must be gauged by those values of the constitutional and law-based state, which have a systemically constitutive nature for the future.

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt a criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.

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Transitional Justice in the Czech Republic

Cheng-Feng Shih

*Professor, Department of Indigenous Affairs and Development
National Dong Hwa University, Shoufeng, Hualien, TAIWAN*

Abstract

During the 1990s, the Central and Eastern European Countries, facing the challenge of coping with the Communist totalitarian past, had largely adopted various measures of lustration in order to accomplish the task at transitional justice. Among them, the Czech Republic has been applauded as one of the staunchest promoters of the lustration laws steadfastly, second only to Germany. After a brief introduction, we will probe into the justifications for implementing lustration laws, and then introduce the dimensions of lustration measures. We then move to discuss debates with regard to whether the practices might undermine efforts at protecting human rights.

Keywords: transitional justice, Czech Republic, lustration laws