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Committee on Legal Affairs and Human Rights

Examining the legitimacy and legality of the *ad hominem* term-limit waiver for the incumbent President of the Russian Federation

Introductory Memorandum

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1. Introduction

1. The subject of the motion for a resolution underlying the present report is the legitimacy and legality of the amendments to the Russian Constitution enacted in July 2020, including an *ad hominem* provision waiving the Presidential term-limits. The waiver allows Mr Putin – who has been continuously in power as President or Prime Minister since 2000 – to remain in office as President until 2036.

2. Since the start of the Russian war of aggression against Ukraine on 24 February 2022, the question of the legitimacy of President Putin's possible re-election in the next presidential election in 2024 has taken on particular relevance. The authority of President Putin has already been put into question both nationally and internationally, due to the obvious miscalculation of the risks involved in invading Ukraine. President Putin and his visibly reluctant inner circle appearing on television during the meeting of the National Security Council on 21 February 2022¹ clearly underestimated the resilience of the Ukrainian people and their preparedness to fight for their independence and their very existence as a nation. President Putin also underestimated the determination of the Western countries to support Ukraine with weapons and ammunition. In addition, the military setbacks the Russian forces have suffered so far at the hands of the heavily outgunned Ukrainians have shown for all to see the state of disorganisation and corruption of the Russian military. Disgruntled members of the President's inner circle may well avail themselves of the unlawfulness of the amendments to the Russian Constitution enacted in July 2020 - in particular the waiver of the Presidential term limit that allows Mr. Putin to run for President again in 2024 and potentially remain in office until 2036 - in order to rid themselves of a leader whose actions are becoming more and more of a threat to the future of Russia, including the welfare of its elites. The motivation for the more rational elements within the inner circle of power to rid themselves of President Putin may well be further strengthened by the increasing momentum of the international community's plans to set up an *ad hoc* international tribunal for the crime of aggression, to hold the political and military leadership of the Russian Federation to account for the unprovoked military aggression against Ukraine.² Those who contribute to ending the war by ousting Mr Putin and the "war faction" within the current leadership may well, rightly in my view, expect to be treated more leniently by the future tribunal.

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¹ [Security Council meeting • President of Russia \(kremlin.ru\)](#)

² see the reports by Damien Cottier on [Legal and human rights aspects of the Russian Federation's aggression against Ukraine \(coe.int\)](#) and by Aleksander Pocij on [The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes \(coe.int\)](#)

3. The explicit international recognition of the illegality of these constitutional amendments, which may in fact constitute “unconstitutional constitutional law” (a concept originally developed by the constitutional or supreme courts of the United States, Germany and Austria, and which has been recognised in numerous jurisdictions³) would further delegitimise Vladimir Putin’s ambition to remain President of the Russian Federation indefinitely, provided that he can continue to suppress any serious political opposition.

4. The question of the legitimacy of the July 2020 constitutional amendments has already been the subject of an Opinion by the European Commission for Democracy through Law (Venice Commission). I will sum up its main findings in chapter 2 of this memorandum. In chapter 3, I will look into the issue of the need for term limits in presidential systems of government, which has been the subject of another Opinion by the Venice Commission, which was commissioned before Russia was expelled from the Council of Europe.⁴ In my conclusions, I will suggest any fact-finding activities that may be helpful in order to update the information and analysis available so far, in particular more information on term limits.

2. Venice Commission Interim Opinion of 23 March 2021⁵

5. The Opinion in question was requested by the Assembly’s Monitoring Committee in May 2020 in the framework of its work on the Russian Federation. This request was intended to supplement the earlier Opinion requested by the Committee on Legal Affairs and Human Rights on the amendments to Articles 79 and 125 of the Constitution (Opinion CDL-AD(2020)009, adopted on 18 June 2020). This request had been limited to the (then draft) amendments to the Russian Constitution related to the execution, by the Russian Federation, of the judgments of the European Court of Human Rights.

6. The Venice Commission, at the time, benefited from the full cooperation of the competent Russian authorities, including the Constitutional Court, the Ministry of Justice and Parliament.

7. It studied and assessed only the constitutional changes themselves and the procedure followed for their adoption, and not the implementing legislation which was then still under preparation – hence the working title “Interim Opinion”. The Venice Commission’s offer of assisting the Russian side also with the formulation of the implementing legislation (cf. paragraph 189 of the Opinion) has not yet been taken up.

8. The Venice Commission strongly criticises both the procedure in which the amendments were adopted and their content.

2.1. Procedural issues

9. As regards the procedure applied for the adoption of the constitutional amendments, the Venice Commission finds that in view of the importance of the amendments and their impact, the regular constitutional amendment procedure should have been applied. The regular constitutional amendment procedure (laid down in the 1998 *Law on the Order of the Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation*) requires, in particular, the convocation of a Constitutional Assembly and that there should be specific amending laws on the different changes proposed, rather than a single *en bloc* vote on all amendments. Instead, a novel *ad hoc* procedure in three stages was introduced by the Amending Law. In the first stage - the drafting of the amendments and their adoption by both houses of parliament and the constituent entities of the Federation - followed the normal constitutional amendment procedure, until the entry into force of Article 3 of the Amending Law. In the second stage, from the moment of the entry into force of said Article 3, a *sui generis* procedure established by Article 3 of the Amending Law was triggered. This procedure involved the President asking for the Constitutional Court’s opinion as to the compatibility of the amendments with Chapters 1, 2 and 9 of the Constitution and the compatibility with the Constitution of the procedure for the entry into force of Article 1 of the Amending Law (which lists the substantive amendments to the Constitution). The Constitutional Court was required to provide its conclusions within seven days. Once the Constitutional Court’s conclusions were given, Article 2 of the Amending Law entered into force and the third stage, governed by Articles 2 and 3 of the Amending Law, namely the *ad hoc* nationwide vote, was launched - a single *en bloc* vote on all amendments that in addition was not subjected to the strict procedural requirements applicable to referendums

³ See: [Unconstitutional Constitutional Amendments \(lawliberty.org\)](https://www.lawliberty.org/)

⁴ Study No. 908/2017, CDL-AD(2018)010 on Term Limits - Part I – Presidents (adopted at the 114th Plenary Session in Venice on 16-17 March 2018)

⁵ INTERIM OPINION ON CONSTITUTIONAL AMENDMENTS AND THE PROCEDURE FOR THEIR ADOPTION, adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021)

10. The Venice Commission notes

“that the *ad hoc* nationwide vote was subject to much less elaborate and detailed rules than a referendum would have been. This resulted in a substantial reduction of procedural guarantees, which are *inter alia* designed to ensure a degree of balance in how the issues are presented, and thus increase the legitimacy of the result of the referendum. The Federal Constitutional Law on Referendums would have required sufficient air-time also for opponents of the amendments (Article 59 (9)). Article 60 (5) of that Law would have obliged State institutions to remain neutral. Article 2 of the Amending Law establishing the *ad hoc* rules for the all-Russian vote ensures airtime to the Central Electoral Commission only and has no provisions on the neutrality of state bodies” [and]

“that under the rule of law it is inappropriate to introduce a new type of referendum for one particular revision of the Constitution. Even if the all-Russian vote did not replace the vote by the Assembly and the constituent entities of the Federation, the Commission recalls that, as indicated in the 2020 Revised Guidelines on the Holding of Referendums, “*referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament’s exclusive jurisdiction*”.⁶

Again in the words of the Venice Commission,

“[T]he Amending Law also derogated from Article 2 (2) of the 1998 Federal Law N 33-FZ On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation, which provides that there should be specific amending laws on interrelated topics, rather than a single *en bloc* vote on all amendments. The Comments [author’s note: by the Russian side] insist that the amendments are all interrelated with each other and therefore the requirement of Federal Law N 33-FZ is met. The Venice Commission cannot follow this argument as the amendments cover a very wide range of issues.”⁷

11. Also, according to the Venice Commission, the Amending Law is at odds with Article 135 of the Russian Constitution in that the Constitutional Court’s conclusions and the all-Russian vote foreseen in Articles 2 and 3 were in fact irrelevant for the entry into force of the amendments after their adoption by the two houses of parliament and the constituent entities of the Federation.⁸

12. I should like to point out that the speed with which these amendments were adopted is also quite remarkable: in a speech on 15 January 2020, President Putin proposed amending various provisions of the 1993 Constitution. By decree of the same day, he established a working group to prepare proposals for such amendments. On 20 January 2020, the President submitted the draft Amending Law to the State Duma. Three days later, the draft passed the first reading. On 2 March 2020, the President proposed additional amendments to the Constitution. The draft, with these new amendments, passed the second and third readings in the State Duma on 10 and 11 March 2020. Approval by the Council of Federation followed on 11 March and by the legislative councils of all federal subjects of the Russian Federation on 12 and 13 March. On 14 March 2020, it was enacted by the President of the Russian Federation and published. At the same day, the President sent a request to the Constitutional Court of the Russian Federation to verify the compatibility of the Amendment Law with the Constitution; the Constitutional Court confirmed this on 16 March 2020. The popular vote was originally scheduled for 22 April 2020. It was finally postponed due to the Covid-19 pandemic and took place from 25 June until 1 July 2020. The question put to the vote was simply: “*Do you approve the amendments to the Constitution of the Russian Federation?*”, with no possibility to give different answers to such disparate proposals as the constitutional recognition of social rights, the prohibition of same-sex marriage and the *ad hominem* provision waiving the constitutional term limits for the President.

13. As regards the procedure followed for the adoption of the constitutional amendments, the Venice Commission therefore concludes that

“[I]n view of the subject matters which were covered, a Constitutional Assembly should have been convened under Article 135 of the Russian Constitution. As a Constitutional Assembly was not convened, the Amendments were adopted, according to Article 136, after their adoption by

⁶ Interim Opinion (note 5), paragraphs 31 and 32.

⁷ Interim Opinion (note 5), paragraph 34.

⁸ See Interim Opinion (note 5), paragraphs 23, 35 and 37.

Parliament and the constituent entities of the Federation. Following these two steps, the Amendments had to enter into force under Article 136. A negative outcome of the additional steps, i.e. the review by the Constitutional Court and the all-Russian vote, could not prevent the entry into force of the Amendments. The procedure used to amend the Constitution creates an obvious tension with Article 16 of the Constitution which safeguards the “firm fundamentals of the constitutional system of the Russian Federation”.⁹

2.2. Substantive issues

14. The substantive changes adopted following the novel procedure described above concern the following areas, following the order of the explanatory report of the Amending Law:

- the position of candidates/office holders;
- the structure of State bodies, their competences and mutual relationships;
- the protection of social rights;
- the basic values of the State; and
- the relationship between the Russian national law and international law.

15. In view of the subject-matter of the present report and the fact that the final point (relationship between the Russian national law and international law) has already been covered in the Venice Commission Opinion adopted on 18 June 2020 on draft amendments to the Constitution related to the execution in the Russian Federation of decisions by the European Court of Human Rights¹⁰ and in the Assembly’s last report on the implementation of judgments of the European Court of Human Rights¹¹, I will limit myself to assessing the first substantive issue, namely the position of candidates and office holders, or more precisely the *ad hominem* waiver of the constitutional term limit of President Putin.

16. The new wording of Article 81 (3) prevents a person from holding the office of the President for more than two terms. But this limit is not applied to current or former Presidents, i.e. (though they are not named explicitly) MM. Putin and Medvedev. According to Article 81 (3.1), this provision “*is applied to the person having held or holding the post of the President of the Russian Federation without taking into account the number of terms he (she) had held or is holding this post by the time of coming into force of the amendment to the Constitution of the Russian Federation introducing the relevant limitation, and does not exclude for him (her) the possibility to hold the post of the President of the Russian Federation: during the terms allowed by this provision*”.

17. As the Venice Commission recalls, “[t]his provision creates an exception for the current and previous holders of the office to stand for two completely new terms, regardless of the number of their past mandates. As this provision applies to two specific persons, this amounts to an *ad hominem* constitutional amendment.”

3. The importance of Presidential term limits for safeguarding democracy

18. In its 2021 Interim Opinion, the Venice Commission refers back to its earlier work on the relationship between the limitation of mandates and democracy.¹² It points out that limiting the mandate of the President of a country to one mandate with the right to one re-election is a standard practice. In most cases (e.g. Czech Republic, Finland, France, Latvia, Lithuania, Romania, Slovakia) more than two *consecutive* mandates are excluded; in some countries (e.g. Austria, Bulgaria, Germany, Poland), no person can run for a third or further term even if it is not consecutive. In some countries, any re-election at all is excluded (e.g. Mexico, the Republic of Korea and Switzerland).

19. In its 2018 Study on Term Limits¹³, the Venice Commission pointed out that

“[p]residential term-limits are common in both presidential and semi-presidential systems, and also exist in parliamentary systems (both where the Head of State is directly and indirectly elected), while in the latter systems they are not imposed on prime ministers, whose mandate,

⁹ Interim Opinion (note 5), paragraph 37

¹⁰ Opinion No. 981/2020, CDL-AD(2020)009, OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION (AS SIGNED BY THE PRESIDENT OF THE RUSSIAN FEDERATION ON 14 MARCH 2020) RELATED TO THE EXECUTION IN THE RUSSIAN FEDERATION OF DECISIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS, adopted by the Venice Commission on 18 June 2020 by a written procedure replacing the 123rd plenary session

¹¹ See [The implementation of judgments of the European Court of Human Rights \(coe.int\)](https://www.coe.int/t/e/treaties/implementation_of_judgments_of_the_european_court_of_human_rights_coe_int.aspx)

¹² Interim Opinion (note 5), paragraph 49.

¹³ 2018 Study (note 4 above)

unlike those of Presidents, may be withdrawn by parliament at any time. In presidential and semi-presidential systems, term-limits on the office of the President therefore are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law.”¹⁴

20. I cannot but agree with the Venice Commission when it finds that

“[t]here are good reasons why presidential systems contain strict mandate limits. In a presidential system which grants substantial executive powers to the president, the longer the incumbent remains in office, the more cemented his or her power becomes”¹⁵,

that

“Term limits aim to protect a democracy from becoming a *de facto* dictatorship. Furthermore, term limits may strengthen a democratic society, as they impose the logic of political transition as a predictable event in public affairs. They can be “*important mechanisms to safeguard against “winner-take-all” politics*”. They also keep alive the opposition parties’ hope of gaining power in the near future through institutionalized procedures, with little incentive to seize power in a coup. Term limits therefore aim to protect human rights, democracy and the rule of law, which are legitimate aims within the meaning of international standards”¹⁶

and that

“in the light of the comparative analysis of the constitutions of the 58 countries under consideration, abolishing limits on presidential re-election represents a step back in terms of democratic achievement, at least in presidential or semi-presidential systems. By eliminating an important protection against distortive concentrations of power, abolishing term limits also risks undermining various aspects of the human right to participate in public life.”¹⁷

21. Very importantly, and of special relevance to the case at hand, the Venice Commission stresses that

“[t]o the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent.”¹⁸

22. As we have seen above (para. 16), the Amending Law, whilst introducing a two-term limit, creates an exception for the current and previous holders of the office to stand for two completely new terms, regardless of the number of their past mandates. This provision amounts to an *ad hominem* constitutional amendment for the benefit of two specific persons.

23. The Russian authorities, in their replies to the Venice Commission summed up in its 2021 Interim Opinion, stress that the removal of term limits was adopted by the Federal Assembly, approved by all the constituent entities of the Russian Federation and approved by the sovereign people in a nationwide vote. The term limits should not be applied retroactively by counting the mandates of the current and former Presidents. Another mandate of the incumbent or former president will depend on the will of the citizens expressed in direct elections. The Russian authorities insist that the constitutional principle of democracy implies the possibility for the people to exercise the right to elect in free elections the person they deem most worthy for the post of the head of state and that the participation of an incumbent does not prejudice an electoral victory. They also consider that the Amendments result in a redistribution of public authority between the various branches of power, in particular from the President to Parliament. These significant changes justified a transitional rule not to take into account the presidential terms before the Amendments. The Constitution provided sufficient guarantees as to parliamentarism, multiparty system, the presence of political competition, the separation of powers, and the provision of rights and freedoms by independent courts, including through constitutional proceedings. The Russian authorities finally pointed out that leaders in other countries (e.g.

¹⁴2018 Study (note 4 above), para. 120.

¹⁵ 2021 Interim Opinion (note 5 above), para. 51.

¹⁶ 2018 Study (note 4 above), para. 93.

¹⁷ 2018 Study (note 4 above), para. 101 (with further references to earlier Venice Commission documents).

¹⁸ 2018 Study (note 4 above), paragraphs 124 and 128; see also *ibid.*, paragraph 110 (with further references to previous Opinions).

Germany's Chancellor Merkel, Finland's President Kekkonen and Luxembourg's Prime Minister Juncker) held office for very long periods.

24. In its 2018 Study on Term limits, the Venice Commission points out that in its member states

“term-limits do not apply to the Head of government (usually the prime minister), who technically may be removed at any time, in contrast to the rigid and difficult impeachment procedures under presidential systems. Therefore, the danger of abuse of power by the Head of the executive branch is greater under presidential regimes than in parliamentary ones.”¹⁹

25. Even the long terms of office of Prime Ministers in parliamentary systems such as Germany (Chancellors Merkel and Mr Kohl) or Luxembourg (Mr Juncker) did not reach anywhere near the length of Mr Putin's potential time in office, from 2000 until (under the newly changed rules) 2036, with only the short interruption between 2008 and 2012 when Mr Medvedev acted as President and Mr Putin as Prime Minister. By contrast, the 16-year presidency of President Franklin D. Roosevelt gave rise to the introduction of a two-term limit in the United States of America.

26. The Russian authorities' argument that the constitutional amendments brought so many changes in the redistribution of power from the President to the Parliament that the abolition of the term limit in favour of the incumbent would be justified does not look convincing either. The imprisonment or forced exile of all remaining politicians who truly oppose the existing regime speaks for itself. The Assembly has already studied the case of Alexei Navalny and other political prisoners and is now looking into the fate of Vladimir Kara-Murza. Even the most prestigious institutions of civil society, including “Memorial” and the Moscow Helsinki Group are closed and their activists in prison or in exile. Especially since the start of the Russian aggression against Ukraine, the State Duma and the Federation Council have completely failed in holding the President and his inner circle to account in any way.

27. Finally, the authorities' assertion made in 2021 that the Russian Constitution provides sufficient guarantees as to “parliamentarism, multiparty system, the presence of political competition, the separation of powers, and the provision of rights and freedoms by independent courts” reads like mockery in light of the accelerating descent into authoritarian rule since then.

28. Interestingly, the 2018 Study on Term limits is based on a different perspective than that underlying the 2021 Interim Opinion. However, the Venice Commission arrives at the same result looking at the issue from either perspective.

29. The 2018 Study was prepared in response to a request by the Secretary General of the Organization of American States (OAS), who asked the Venice Commission to undertake a study on the right to re-election, to answer four questions in particular:

- Does a human right to re-election exist? If so, what are the limits to this right?
- Do term limits constrain the human and political rights of aspirant candidates?
- Do term limits constrain the human and political rights of voters?
- What is the best way to modify term limits within a constitutional state?

30. By contrast, the 2021 Interim Opinion was prepared following a request by the Assembly's Monitoring Committee, which was worried about the ad hominem waiver of the presidential term limit in the Russian Federation, much like the movers of the motion for a resolution underlying this report.

31. In its 2018 Study (paragraphs 94 and 95), the Venice Commission recognizes that

“In modern democracies, the sovereignty of a nation resides in the people. All state authority shall emanate from the people. No one can therefore argue to be entitled to run for re-election after a first mandate if the constitution provides otherwise. The restriction to the right to be elected derives from a sovereign choice of the people in the pursuit of the above-mentioned legitimate aims of general interest, which prevail over the right of the incumbent president. [...] For the above reasons, it is obvious that limiting presidential mandates for reasons of safeguarding democracy, which together with human rights and the rule of law is a foundational value of the Council of Europe, does not amount to discrimination in the sense of Art. 1 of Protocol 12. Limits on presidential mandates, aiming at securing democracy, i.e. the very same purpose which electoral

¹⁹ 2018 Study (note 4 above), para. 92.

rights also serve, would not be found discriminatory or unreasonable in the sense of Art. 25 of the ICCPR. Limitation of mandates is not one of the grounds for discrimination contained in international treaties. However, term limits should be neutral and should not be imposed or removed in a manner that would prematurely remove someone from office or secure the continued service of someone currently holding office (i.e., by lifting term limits). This risk may be averted if such changes do not benefit the incumbent.”

32. From both perspectives, that of the incumbent wishing to run for an additional mandate or that of the defenders of democracy worrying about the overwhelming power of the executive, it is obvious that any change to the presidential term limits must be carefully considered by society as a whole. In the words of the Venice Commission,

“[a] decision to alter or remove presidential term limits should be subject to thorough public scrutiny, as it has a significant impact on the political system, a country’s stability and on confidence in the electoral process. In the long term, a reform of these provisions may affect democratic quality or even democratic endurance. A broad consensus, as well as respect for constitutional and legal procedures, is crucial to maintain strong democracy and confidence in institutions and electoral processes.”²⁰

33. Given the rapid-fire procedure followed for the adoption of the amendments in question and the joint treatment of and vote on very disparate issues (see para. 12 above), it would appear that this condition was not met in the case at hand.

4. Fact-finding proposals

34. As a visit to the Russian Federation is not feasible in the near future and the Venice Commission itself was faced with the refusal of the Russian authorities to cooperate in its further work on this topic, I would suggest that we hold an exchange of views with two of the Venice Commission members who contributed to the 2021 Interim Opinion on the draft Russian Constitutional Amendments and the 2018 Study on term limits. I suggest that we ask them to also present the positions and arguments brought forward by the Russian authorities while they were still cooperating in the preparation of the Interim Opinion.

5. Preliminary conclusions

35. Term limits keep Presidents in check. Presidents who know their term is finite and who presumably want to live out the rest of their lives in their home country have an incentive not to use excessive force against political opponents, for they know one day one of them may be elected as their successor and they will no longer be able to exercise political power to protect themselves from the consequences²¹.

36. Therefore I strongly feel that term limits are not just allowed in a democracy (from the point of view of the ruler’s rights), but they are necessary to preserve the rights of the people. Term limits mean that the president and definitely the president in his or her last term, has more incentives to be preoccupied with the challenges facing their country and with securing that their political allies stay in office, than with brutal suppression of the opposition.

37. And please note: once a president has taken the path of severe oppression of the opposition and cruelty against his own people, he knows there is no way back. Relinquishing office then means risking to turn from a hunter to prey and spending the rest of their time clinging to office at ever higher cost to his own country, his own people and ultimately himself.

38. That is why a country, which takes a big step towards extending term limits, takes a large step away from democracy and the rule of law. Other States, including Members of the Council of Europe, were too slow to realise the risks attached to these constitutional changes and too quick to accept the outcome of the referendum.

²⁰2018 Study, note 4 above, paragraph 109.

²¹The murder of Boris Nemtsov, the leading contender for President Putin’s succession, is a case in point. As shown in the report by our colleague Emanuelis Zingeris, this murder, right in front of the Kremlin wall, could have never even happened, let alone remain unelucidated, had the system of prevention, investigation and prosecution of crimes been allowed to function normally (see [Shedding light on the murder of Boris Nemtsov \(coe.int\)](#))

39. A president together with his or her political allies usually wields substantial power to nominate allies to high positions in the state, be it the highest courts, the electoral body, the auditors' office, the armed forces, the central bank or other institutions. It is the function of these constitutional institutions to keep presidential powers in check. These checks and balances tend to erode over time when a president remains in office, as he or she will nominate friends and allies to those key positions. Dissenting voices will disappear from his or her inner circle. Ultimately this has a high cost to the President, too, as the system of checks and balances exists to prevent large-scale errors. In my view, this can be observed in Russia: President Putin clearly no longer received reliable information on the effective power of the armed forces and the Ukrainian people's will (and ability) to resist, when he decided to invade Ukraine.