

Corruption, Democracy, and the Rule of Law in France

NOTRE AFFAIRE À TOUS. By Eva Joly.
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*An Essay Review by Martin A. Rogoff**

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I. INTRODUCTION

Eva Joly's recent book *Notre affaire à tous* (Everybody's Business) is a wake-up call to citizens and a warning to business leaders and public officials alike regarding the threat to democratic government posed by a new type of crime and new kinds of political relations, both of which are the product of a new world (*un nouveau monde*) of economic and financial arrangements. Even though the book focuses on events in France, the problems she addresses are to a large extent the product of changes in the international financial and regulatory environment, require international cooperation for their resolution,¹ and perhaps most

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1. On international efforts to combat international financial criminality and corruption, see Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345 (2000); Andrea D. Bontrager Unzicker, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEG. STUD. 655 (2000); Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547 (2000); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593 (2000); Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption:*

importantly are representative of similar problems faced by other western European democracies, the European Union, and other advanced democracies around the world.² Joly explodes the myth that endemic and systemic political and financial corruption is a phenomenon limited to developing states with weak laws, institutions, and public service traditions, and demonstrates how it has become central, not merely episodic or aberrational, to political and economic life in advanced democracies as well.

Eva Joly is not an academic nor a journalist, observing and evaluating from afar, but rather a judicial official charged with investigating the very activities she describes and analyzes in her book. Her perspective and experience thus give the book a compelling immediacy and focus attention on the practical problems of uncovering, documenting, and controlling financial crime and political corruption.³ Her practical orientation and considerable investigative experience in turn provide an informed basis for her more speculative observations concerning the corrosive effect of financial and political corruption on democracy and on the economy in France.

It is significant that Joly's personal and professional background and experience differ greatly from those of the typical French judicial official. As a result, she brings broad and fresh perspectives to her evaluation of the French criminal justice system, which allow her to provide important insights into its operations. She comments perceptively on the training, attitudes, motivations, and perspectives of the prosecutors, judges, examining magistrates, and *police judiciaire* who implement the system.

As *juge d'instruction* (examining magistrate)⁴ of the *Tribunal de grande instance* in Paris, Joly has been responsible for directing some of the most important, controversial, and high profile investigations into financial crime and political corruption in France over the past decade.

Normative Regimes Despite Mixed Motives and Diverse Values, 33 CORNELL INT'L L. J. 731 (2000).

2. For a brief description of the collective resignation of the European Commission in the face of charges of favoritism, conflicts of interest, and inattention to procedural and financial irregularities, see PIERRE LASCOUMES, *CORRUPTIONS* 29-30 (1999) [hereinafter cited as *CORRUPTIONS*]. Other democracies, too, have problems with corruption. For recent examples, see Dan Barry, *Providence Mayor Indicted on Racketeering Charges*, N.Y. TIMES, Apr. 3, 2001, at A10; Celia W. Dugger, *The Sting That Has India Writhing: On Tape and on the Internet: The Great Graft Exposé*, N.Y. TIMES, March 16, 2001, at A3. See also Seth Mydans, *Corruption Case Against Thailand's Leaders Tests Rule of Law*, N.Y. TIMES, Apr. 10, 2001, at A7.

3. "The knowledge of the magistrates is practical, almost physical." EVA JOLY, *NOTRE AFFAIRE À TOUS* 217 (2000).

4. A literal translation of *juge d'instruction* is "investigating judge." See Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 534 n.21 (1997).

She characterizes the Elf-Aquitaine investigation, which she directed, as “without doubt the most important financial matter ever investigated in Europe.”⁵ One of the central figures in that investigation was Roland Dumas, a former foreign minister, and at the time of the commencement of the investigation, the president of France’s Constitutional Council (*Conseil constitutionnel*). Based on her experience in the Elf investigation and many others, she is convinced that “financial criminality is imbedded in the economy and that it casts a shadow on our future.”⁶ That is what motivated her to write this book.

She explains:

A society needs to rest on laws which reflect common values. Judicial investigations in Europe, whether in Italy, in Spain, or in Germany, demonstrate the failure of public administration and criminal activities at the center of power. We thought until now that crime lived in the shadows of society. We [now] find it intimately linked to major business enterprises or to the most honorable European political leaders.

Either our old democratic nations will decide to question the scope of the phenomenon and to seek to understand its symptoms in order to find adequate remedies, or we will prefer to remain collectively blind. . . .

The application of the law (*la loi*) and the respect for law (*le droit*) are the guarantees of democracy. My ambition in this book is first of all to the serve the common good. I want to recount the injustice a generation of magistrates is uncovering each day throughout Europe.⁷

Even though Joly is a judicial official and must maintain a necessary silence regarding her cases,⁸ there is “a culpable silence: that of consenting victims. To be silent would be to accept the role of scape-goat for all the powers that be that our actions disturb.”⁹ Joly is alluding here to the intense criticism her aggressive investigations into high-level financial crime and political corruption provoked not only from the subjects of her inquiries, but also from governmental officials and certain members of the French legal community.

5. JOLY, *supra* note 3, at 15.

6. *Id.* at 183.

7. *Id.* at 19-22. Joly points out that the Palais de Justice is situated in the heart of Paris, on the Île de la Cité. Her implication is that justice is central to the French body politic. *Id.* at 114.

8. On the obligation of secrecy of the *juge d'instruction*, see RENAUD VAN RUYMBEKE, *LE JUGE D'INSTRUCTION* 40-41 (2d ed. 1992).

9. JOLY, *supra* note 3, at 20.

II. THE JUGE D'INSTRUCTION

It is important to know something about Joly as a person and her professional career path, as both differ significantly from those of the typical French *juge d'instruction* and each has had an important influence on her actions and attitudes. Eva Joly was born in Norway and spent the first 20 years of her life there. She grew up in modest circumstances in an egalitarian society. She recounts, for example, that the prime minister of Norway lived in an ordinary apartment in a working class part of Oslo and that his children attended her school without fanfare.¹⁰ Furthermore, she points out that Norway has never known an aristocracy and that villages have been organized in a communitarian manner there for the last thousand years.¹¹ Although Protestant, and having received considerable instruction in religion, Joly rejected its preoccupation with guilt. She says that it took her a long time to shed Protestant austerity and to discover her true feelings.¹² She remembers, however, that her high school French teacher expressed the Norwegian view that "the French were a mixture of Neapolitans and Sicilians."¹³ Joly's investigative fervor has been criticized as stemming from her puritan Norwegian Protestant background.¹⁴ In distancing herself from the rigid Protestant training of her youth and stressing her attraction to and immersion in the French way of life, French culture, and French ways of thinking, Joly seeks to counter this line of attack.

Joly came to France in 1964 as a twenty-year-old student of the French language. She immediately fell in love with France and French culture, as well as with the personal freedom and choices afforded by life in Paris. She married a young Frenchman, a medical student, from a prominent family. His family cut him off financially because of this marriage, which they considered ill-advised and inappropriate. So, while her husband continued his medical studies, Joly took a job as a secretary in a commercial enterprise. She also studied law at night. Upon finishing his medical studies in Paris, Joly's husband began the practice of medicine in the Essonne, not far from Paris. Joly found a job as legal advisor in a psychiatric hospital in the region. In 1981, when Joly was thirty-eight, the Ministry of Justice organized a special competition for entry into the *magistrature* for legal professionals with a certain number of years of experience, without completing the ordinary training program. Normally,

10. *Id.* at 193.

11. *Id.* at 193 n.1.

12. *Id.* at 30.

13. *Id.* at 25.

14. *Id.* at 112.

one became a magistrate after successfully completing a program of study at the *École Nationale de la Magistrature* in Bordeaux, which one entered in one's early or mid twenties directly after receiving a university degree in law.

Joly was successful in the special competition and received an appointment to the magistrature. In France the *magistrature* is composed of two categories: *magistrats du parquet* (or *magistrats debout*) and *magistrats du siège*.¹⁵ *Magistrats du parquet* perform the prosecutorial function. They are responsible to the Minister of Justice. *Magistrats du sièges* are the judges who decide cases. *Juges d'instruction* (examining magistrates), who are responsible for conducting investigations in more complex criminal cases, are also *magistrats du siège*,¹⁶ although they play no role in the final decision of cases. Joly took a position as assistant public prosecutor in Orléans. Besides handling ordinary criminal matters, she was assigned to handle juvenile matters. In Orléans she was struck by the inefficient organization of the tribunal. "My colleagues, who for the most part had passed from the [law] faculty to the tribunal, with a detour through the *École de la magistrature*, had always seen things [the way they are]."¹⁷ "Each magistrate was enclosed in his own bubble of paper. . . . The advancement of magistrates was decided on the basis of reams of evaluations given by their superiors, which produces the phenomena of courtship and reverence. The system makes us childish. . . ." ¹⁸ As for the president of the tribunal, its administrative head, Joly found his principal concern to be dealing with parking problems.¹⁹

After two years in Orléans, Joly obtained an appointment closer to home, in Évry. The contrast with Orléans was striking. In Orléans the Penal Code reflected the values of the traditional society to which it applied. The hierarchy of crimes and punishments made sense. In Évry, however, an area with a large immigrant population, where parents and

15. Joly says that a 1997 poll indicated that seventy-five percent of French people were unaware of the function of the prosecutor. *Id.* at 51. So she provides an appendix which describes the French judicial system. *Id.* at 237-47.

16. See RENAUD VAN RUYMBEKE, *LE JUGE D'INSTRUCTION* (2d ed. 1992); Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 *TEMP. INT'L & COMP. L.J.* 87 (1999). On the French criminal justice system generally, see Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care?*, 78 *CALIF. L. REV.* 539 (1990); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 *MD. L. REV.* 131 (1983).

17. JOLY, *supra* note 3, at 56.

18. *Id.* at 64. The dominant culture of the magistrature has been described as one of "submission and overcautiousness." PIERRE LASCOUMES, *ÉLITES IRRÉGULIÈRES: ESSAI SUR LA DÉLINQUANCE D'AFFAIRES* 291 (1997).

19. JOLY, *supra* note 3, at 57.

relatives were unemployed, where drug dealers were everywhere, where petty criminals were making more money than was possible for one who diligently applied himself in school, what sort of "justice" was appropriate? Joly began to reflect on the substance of the criminal law itself, and how its application necessarily changes as economic and social conditions and values change.²⁰ She analogizes justice to a man who has lost his keys at night, and is searching for them only within the perimeter of the light of a street lamp. He will only find what the street lamp lights up.²¹ As new values and new threats to the social order emerge, the perimeter of light cast by the street lamp must be enlarged or redirected, so as to illuminate the acts or arrangements which must become matters of concern to the criminal justice system.

Joly's next career move, in 1989, was to the Ministry of Finance, where she is assigned to an office responsible for restructuring ailing businesses. Here she learns how efficient and effective the state can be when it really wants to be. Her colleagues are the best and the brightest, graduates of France's most elite schools, resources are abundant, projects are handled collegially, a sense of urgency leads to prompt and efficient action, and merit is recognized and rewarded. Joly is particularly impressed by her office's culture of effective action and "real time" and is exhilarated by the "euphoria of acting [effectively]."²²

After three years at the Ministry of Finance, Joly decided to rejoin the magistrature. She was named to the newly-created post of *juge d'instruction* for financial matters at the *Tribunal de grande instance*²³ in Paris. Upon taking up her functions, she immediately realized that financial delinquencies were marginal in the thinking of the president of the tribunal,²⁴ and the resources at the disposal of the financial section (tiny offices, no computers, no Minitel, no fax machines, outdated telephones, inadequate staff, etc.) only reinforced her view that "the activity engaged in by the financial section was marginal and without importance."²⁵ She attributes this in part to the traditional Latin attitude "where money is something that one hides and that is good form to

20. *Id.* at 75-79.

21. *Id.* at 89. "Society is constantly redefining itself and the domain of criminality changes at the same time as [our common values change]." *Id.* at 77.

22. *Id.* at 102.

23. The *Tribunal de grande instance* is the most important court of first instance. It has jurisdiction over all civil cases involving 30,000 francs or more, unless a law has allotted jurisdiction to a special court. The criminal branch of the *Tribunal de grande instance* is called the *Tribunal correctionnel*. WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 30, 35 (1995).

24. JOLY, *supra* note 3, at 111-12.

25. *Id.* at 115.

scorn.”²⁶ As for her new colleagues, they accepted this situation. “Confined ever since their days at the *École de la Magistrature* in the straitjacket of habit and lassitude, many of my colleagues concentrated on their work without questioning their methods.”²⁷

Joly, however, is most definitely not a person of “habit and lassitude.” She was familiar with the world of business and finance; she was used to having an impact on the world. She took matters into her own hands to acquire the resources she needed, personally purchasing and borrowing needed equipment and using the media to publicly highlight the lack of resources of her section.²⁸ She aggressively pursued the dossiers assigned to her,²⁹ using all the tools at her disposal. She describes the six keys to her success in inquiring into financial delinquencies.³⁰

First, and foremost, she applied the same investigatory techniques to financial crime as were typically applied to ordinary crime (like wiretaps, following suspects, searches, police custody, summons, etc.). To Joly, this followed naturally from the principle of equality before the law.³¹ Her methods, however, raised a storm of protest because white collar crime was perceived as different from ordinary criminality and the subjects of her investigations were, for the most part, prestigious and respected corporate and political leaders.

Second, Joly broke with precedent and hierarchy to establish close links and to direct in detail the activities of the *police judiciaire* (judiciary police),³² and in turn she relied heavily on their work. Third, she kept the prosecutor’s office informed of her activities, so that when she needed supplemental authorizations from the prosecutor to expand the scope of her investigations, she had a sympathetic and understanding ear. Fourth, she reoriented her thinking to the realities of the new world of financial and political crime she was charged with investigating. She had to get

26. *Id.* at 113. She contrasts this with the Anglo-Saxon view which sees money as a fundamental factor in economic and social life. *Id.*

27. *Id.* at 121.

28. Peter Lennon, *Scambuster!*, THE GUARDIAN, Feb. 3, 2001, at 8.

29. A *juge d’instruction* can only investigate matters assigned to her by the prosecutor, and only within the scope of that assignment. To enlarge the scope of an investigation, the *juge d’instruction* must obtain the authorization of the prosecutor. The *juge d’instruction* may also be authorized to conduct an investigation by the complaint of the victim in a *partie civile* proceeding. In any case, the *juge d’instruction* does not have the authority to undertake an investigation or to extend its scope *sua sponte*.

30. JOLY, *supra* note 3, at 137-52.

31. *Id.* at 138.

32. Officers of the judicial police are authorized by law to exercise certain investigative and coercive powers. Most *gendarmes* with five or more years of experience are *officiers de la police judiciaire*. Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 158 (1983).

used to a totally different perspective on the world of criminality, a parallel universe, intimately linked to the most honorable and most official members of society. Fifth, she took the untraditional step of deciding to conduct her investigations collaboratively, in partnership with another *juge d'instruction*. Laurence Vichnievsky, who brought complementary skills, experience, contacts, and perspectives to the task, was assigned to work with her. More recently Renaud van Ruymbeke has joined Joly and Vichnievsky. Sixth, she cultivated cooperative relations with foreign judicial officials, so as to be able to obtain more easily documents and other evidence located abroad that she needed for her investigations. She is particularly pleased with the *Appel de Genève*, a call issued in 1996 by seven magistrates from different European countries, including Renaud van Ruymbeke from France, for the creation of a "European Judicial Area" (*un espace judiciaire européen*) to allow European magistrates to more effectively combat financial crime.³³

The investigations directed by Eva Joly, particularly the Elf-Aquitaine investigation, have come under heavy attack. Why? First of all, the French have a visceral aversion to a *gouvernement des juges*, which dates back as far as the French Revolution.³⁴ The prevailing view has traditionally been that matters which have political implications should be handled by the political branches of government, the legislature or the executive, and not by judges. As for the *juge d'instruction*, there is a saying attributed to Balzac that he is the most powerful man in France.³⁵ The implication is one must be on guard against abuses of that power.³⁶ Second, French society is still divided between authoritarian and democratic traditions, and judicial attacks on respectable members of the corporate or political establishment may raise the specter of "the red judge, settling his ideological accounts with the bosses under the cover of

33. The *Appel de Genève* is reproduced in JOLY, *supra* note 3, at 249-51. The *Appel* calls for the establishment of "a genuine European judicial space within which magistrates can, without obstacles other than those of the rule of law, seek and exchange information useful for investigations in progress." The *Appel* urges the conclusion of international conventions among European countries which would allow the lifting of bank secrecy on proper requests for judicial assistance, permit direct communication between European judges, permit the prompt communication of investigative results of international commissions rogatory, and reinforce mutual administrative cooperation in fiscal matters.

34. The classic French work expressing hostility to a "government of judges" is ÉDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1921).

35. The exact source of this description remains undiscovered. Edward A. Tomlinson, *The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System*, 53 LA. L. REV. 1091, 1104 n.46 (1993).

36. Reforms of the Code of Criminal Procedure in 1992 and 2000 have in fact curtailed the power of the *juge d'instruction*.

respect for law."³⁷ Third, France, although a democracy, has always had strong aristocratic traditions. It is generally accepted that France will be governed by a carefully selected cadre of capable and highly trained individuals. Joly remarks that France accepts the principle that out of an age-group of 700,000 children, scarcely 300 will prove fit to run the country; and the selection process stops at the age of 25.³⁸ Those who occupy leadership positions are presumed to be the most capable and are in fact given considerable leeway in their exercise of power. Fourth, the concept of conflict of interests, so highly developed in the Anglo-Saxon world, is only dimly perceived in France. For example, it is not only not unusual, but it is the norm, for a French elected official to occupy more than one elected position at the same time, member of the national parliament or national government, say, and also mayor or member of a departmental government. This is called the *cumul des mandats* (the holding of more than one office at the same time). Another manifestation of the lack of sensitivity to conflicts of interest is the common practice of *pantouflage*, whereby administrative officials are seconded to positions in the private sector. Without a well-developed sense of conflict of interests, French political and business leaders, as well as much of the French public, simply do not see anything wrong with persons occupying positions where conflicts of interest are inevitable and even with profiting from those positions.

The work of Joly and other *juges d'instruction* in financial matters has been made more difficult by resistance or foot-dragging from the Ministry of Justice and judicial officials,³⁹ hostility from lawyers' groups,⁴⁰ court actions seeking to block the use of certain evidence-gathering techniques,⁴¹ court decisions interpreting narrowly the substantive criminal law applicable to financial corruption,⁴² the blatant destruction of

37. LASCOURMES, *supra* note 18, at 281.

38. JOLY, *supra* note 3, at 101.

39. *Id.* at 124, 135, 181, 183-84.

40. Airy Routier, *Une perquisition de trop?: Feu sur Eva Joly*, LE NOUVEL OBSERVATEUR, Apr. 15, 1999 (indicating that Eva Joly has been "vilified" by the Conseil de l'Ordre des Avocats).

41. *Id.* *Les poursuites engagées contre les juges d'instruction Eva Joly et Laurence Vichnievsky sont irrecevables*, LE MONDE, May 5, 2000 (reporting on the dismissal of an action by the Court of Appeals of Paris challenging searches ordered by Eva Joly and Laurence Vichnievsky at the home and office of a lawyer for a subject of investigation in the Elf-Aquitaine case).

42. *Un arrêt dangereux*, LE MONDE, Feb. 6, 1997 (describing a decision of the Cour de Cassation holding that bribes paid by corporate officials with the intent of benefiting their enterprises can not justify a prosecution for the abuse of corporate property).

evidence,⁴³ changes in the law limiting the power of the *juge d'instruction*,⁴⁴ and the noncompliance with their orders by high-ranking political officials.⁴⁵ At times Eva Joly has received threats serious enough to warrant the protection of armed police officers.⁴⁶

Pierre Lascoumes points out that financial corruption has not become a significant political issue in France.⁴⁷ Eva Joly would undoubtedly like to see that issue become part of the public political debate. *Notre Affaire à Tous* is in large part aimed over the heads of the governmental and legal establishment which has been lukewarm, if not hostile, to her investigative efforts in order to reach the French people at large so as to elevate financial and political corruption into important political issues.

III. UN NOUVEAU MONDE

The new world of finance and politics described by Joly is the now-familiar world of globalization and deregulation. This new world is not simply one of changes in economic and financial arrangements, for these in turn have modified "the nature of politics, our relations to others, and the values of our society."⁴⁸ This new world is a far cry from the welfare state (*l'État-providence*) which existed in Europe for about thirty years following the Second World War.⁴⁹ During the ascendancy of the welfare state, according to Joly,

43. Jacques Follorou, *Cambriolages et incendie: les étranges déboires du juge Eva Joly*, LE MONDE, Sept. 9, 1997 (describing the strange disappearance of documents sought by Eva Joly by a fire and a burglary).

44. See Loi, n° 200-516, June 15, 2000, renforçant la présomption d'innocence et les droits des victimes, 138 J.O. (June 16, 2000), which entered into force on January 1, 2001. The stated purpose of this law is to conform French criminal procedure to the requirements of the European Convention on Human Rights. The law allows the assistance of counsel at the commencement of the *garde à vue* (*police custody*), the right to consult privately with counsel, and the right to be informed of the facts on which the custody is based and of the right to remain silent. The law allows a person, accompanied by his attorney, to meet and talk with a *juge d'instruction*, without being formally placed under examination. The law creates the position of *juge des libertés et de la détention* to decide whether a person under examination by a *juge d'instruction* should be held in preventive detention. Prior to this law, the *juge d'instruction* alone had this power. The law also allows appeals from decisions of the *cour d'assises*, the court where the most serious crimes are tried before a jury.

45. Judith Miller, *French Leader Cannot Elude Net of Inquiry Over Scandal*, N.Y. TIMES, Apr. 27, 2001, at A9; Robert Badinter, *Président et témoin*, LE MONDE, Dec. 16, 2000.

46. Erich Inciyan, *Menace, le juge Eva Joly a été placé sous protection policière*, LE MONDE, June 20, 1996.

47. LASCOURMES, *supra* note 18, at 293.

48. JOLY, *supra* note 3, at 211. See generally JOSEPH S. NYE, JR. & JOHN D. DONAHUE (eds.), GOVERNANCE IN A GLOBALIZING WORLD (2000).

49. JOLY, *supra* note 3, at 197.

[t]he conviction that governments ought to regulate the economy in general and finance in particular was a certitude shared in Europe as well as in the United States (with, to be sure, nuances particular to each political culture). The State was therefore charged with the oversight of money. The operation of the market took place under the attentive and exacting eye of the administration, which strictly circumscribed the financial sector.⁵⁰

The welfare state was more than an economic model, "it diffused a certain idea of the nature of things."⁵¹ Now, according to Joly, with the disappearance of the welfare state mentality, it would be futile to invoke the public morality of former leaders or to lament the disappearance of common values as a response to financial criminality.⁵² For the thirty years following the Second World War, the top civil servant, carefully selected, highly-trained, and devoted to the public interest represented the French social model *par excellence*.⁵³ This is no longer the case; and it inevitably leads to a greater tendency to corruption.⁵⁴

The prevalent mentality of people in the new world of economics, finance, and politics differs significantly from that of the welfare state era. Joly sees markets as the central factor in determining our future⁵⁵ and money as occupying a new place in our lives.⁵⁶ In the global world, money has become the sole universal principle; it has become the measure of individual success, as well as that of societies.⁵⁷ Public officials, too, increasingly measure their success and prestige in terms of

50. *Id.* at 192. Commenting on the same phenomenon, Yves Mény remarks: "The state bowed to market pressures, international regulation imposed itself more and more at the expense of traditional internal interests, and the values of public service gave way to the rules of competition, accountability and efficiency." Yves Mény, *Corruption French Style*, in WALTER LITTLE & EDUARDO POSADA-CARBÓ (eds.), *POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA* 159, 167 (1996).

51. JOLY, *supra* note 3, at 195.

52. *Id.* at 190.

53. *Id.* at 194.

54. According to Yves Mény:

Where . . . there is a marked esprit de corps characterized by the defence of values such as 'the general good' and 'public service' which have been profoundly interiorized by those concerned, the cost of corruption is going to be high. . . . Likely material rewards will not compensate for the moral loss resulting from the moral loss from violation of the group norms. . . . Corruption is thus more likely to spread in cases where the 'immune defence systems' of the group tend to weaken and the 'moral cost' drops; as will occur when public behavior is less prized than private, when producing results comes to matter more than observing standards, monetary values more than ethical or symbolic values.

Yves Mény, *France: The End of the Republican Ethic?*, in DONATELLA DELLA PORTA & YVES MÉNY, *DEMOCRACY AND CORRUPTION IN EUROPE* 7, 18 (1997).

55. JOLY, *supra* note 3, at 190.

56. *Id.* at 191.

57. See JEAN-MARIE GUÉHENNO, *LA FIN DE LA DÉMOCRATIE* 146 (1993).

money, rather than their dedication to and success at promoting the public interest. The French practice of *pantouflage*, where civil servants are seconded to positions in the private sector, is a principal manifestation of this phenomenon.

Not only are public officials less concerned with promoting the general interest in the new world of globalization and deregulation, but the very nature of the public function has changed. In losing (through globalization) or giving up (through deregulation) their control of financial markets, national governments have lost their power of regulation.⁵⁸ But national political officials still retain important decision-making powers. They decide which enterprise, among those competing for a particular economic opportunity, will be selected.⁵⁹ In this new political order, the payment of a "commission" may appear to be a logical act. "Certain leaders . . . have simply auctioned off a technical decision, like the manager of a supermarket who gives the best shelf space to the highest bidder."⁶⁰ Joly describes this practice as "*le pouvoir aux enchères*" (power up for auction).⁶¹

Joly describes the economic deregulation which began in the late 1970s and has continued and accelerated to this day. She concludes that the global economy has escaped the regulation of nation states.⁶² One important consequence has been the opportunities this has offered to organized crime and to others involved in prohibited activities (like drugs, arms sales, prostitution, etc.) to launder money and to penetrate the legitimate financial world.⁶³ This development has fueled unhealthy and potentially dangerous speculative activity, since the possessors of these funds are less concerned with making sensible investments than with laundering their illegal gains. As Joly puts it, "illegal money facilitates speculation because no one really cares about losses."⁶⁴

Joly fears that if Europeans do not become aware of and serious about combating financial crime and do not take strong preventive measures, "we only have to wait for some spectacular market crash or for a scandal more devastating still than those we have known."⁶⁵ Joly's

58. JOLY, *supra* note 3, at 208.

59. *Id.* at 210.

60. *Id.*

61. *Id.* at 208.

62. *Id.* at 199; see also JEAN DE MAILLARD & PIERRE-XAVIER GRÉZAUD, UN MONDE SANS LOI: LA CRIMINALITÉ FINANCIÈRE EN IMAGES (1998) (including a preface by Eva Joly & Laurence Vichnievsky).

63. JOLY, *supra* note 3, at 203.

64. *Id.* at 206.

65. *Id.* at 224-25.

strongly expressed apprehension for possible serious economic problems in the future resulting from the lack of effective regulation of international financial markets and unhealthy investments and speculation is a response to the feelings of many people that financial crime and political corruption are victimless crimes.⁶⁶ As such they are “accepted by the elites and tolerated by the people.”⁶⁷ In reality, however, while economic cost to the average citizen in normal times may be slight, the prospect of serious economic disruption, and the likelihood of political and social turmoil which very well might accompany it, has the potential to affect each and every citizen catastrophically, as the worldwide economic disaster of the 1930s demonstrated.

IV. DEMOCRACY

Since the end of the Cold War nearly fifteen years ago, the most commonly voiced political goal of United States foreign policy has been the expansion of democratic government abroad. The member states and citizens of the European Union are likewise concerned with democracy within the political structure that they are in the process of building. Democratic government is seen by Americans and Western Europeans as positive and desirable, a system that should be fostered and expanded at home and abroad. The good repute that democracy presently enjoys has not always been the case. For instance, during most of the first half of the twentieth century Europeans often lacked confidence in democratic systems of government to deal effectively with economic, social, political, and national security matters, and turned to nondemocratic forms of government for answers.⁶⁸ The Second World War was in large part the product of these preferences for authoritarian leadership. The desirability and effectiveness of democratic government, therefore, cannot be taken for granted. If democratic government fails to express and implement the needs of its particular body politic, it is vulnerable to replacement.

Political thinkers from the time of Aristotle have recognized the fragility of democracy as a form of government and its tendency to evolve into some form of authoritarian rule.⁶⁹ In fact, French constitutional history since the Revolution provides a classic example of this phenomenon. Authoritarian governments, like those of the Terror,

66. See LASCOURMES, *supra* note 2, at 16.

67. *Id.* at 13; see also Alessandra Stanley, *Official Favors: Oil That Makes Italy Go Round*, N.Y. TIMES, Apr. 20, 2001, at A4.

68. See generally MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* (1998).

69. See ARISTOTLE, *THE POLITICS OF ARISTOTLE* 214-17 (Ernest Barker transl., 1958).

Napoleon, Napoleon III, Vichy, and General de Gaulle, have replaced democratic governments perceived as ineffective or unrepresentative of the contemporary social contract.⁷⁰ As for the current situation, according to Dominique Moïsi, "France is probably sicker politically than is generally thought. . . . Corruption, and the threat that it will be exposed, hangs like the sword of Damocles over the heads of politicians on both sides."⁷¹ A recent commentator in *Le Monde* opines that "democracies die from the laughter and scorn of their citizens for their leaders."⁷²

In the European view, democracy as a form of government rests on the twin pillars of sovereignty of the people and representation,⁷³ actualized in practice by universal suffrage and political parties.⁷⁴ Democracy is characterized by the role that it accords to the people. "It is [the people] which is now the source of sovereignty. That is not to be reduced to a passive authorization or to a right to resistance, but implies an active right of control and participation in public affairs."⁷⁵ It is not enough that the people freely choose their representatives. Central to the success of the democratic experience, then, is the responsiveness of those representatives to the will of the people, not necessarily in individual cases, but in the sense that elected officials attempt in good faith to ascertain and to implement the public interest. Democracy, in the European view, is not simply a technique; it is also a value.⁷⁶ According to Jean-Marie Guéhenno:

To make democracy a value is to recall that the affirmation of the common good and the constitution of a public sphere are inherent in human destiny, and that no individual is fully fulfilled if there isn't the possibility, which is for some a duty, to participate in the public life of his country.⁷⁷

It is a perversion of democracy for individuals or for the people's representatives to pursue their own private interests or the private interests

70. See Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 MAINE L. REV. 21, 60-64 (1997) [hereinafter Rogoff, *Constitutionalism in France*]; see also Martin A. Rogoff, *The French (R)evolution of 1958-1998*, 3 COLUM. J. EUR. L. 453 (1997/1998).

71. Dominique Moïsi, *The Trouble with France*, 77 FOREIGN AFFAIRS No. 3 (May/June 1998) 94, 103.

72. Nicolas Baverez, *Démocratie française: le renouveau ou la mort*, LE MONDE, Oct. 5, 2000.

73. CONSTANCE GREWE & HÉLÈNE RUIZ FABRI, DROITS CONSTITUTIONNELS EUROPÉENS 192 (1995).

74. *Id.* at 223, 387-434.

75. *Id.* at 223.

76. JEAN-MARIE GUÉHENNO, L'AVENIR DE LA LIBERTÉ: LA DÉMOCRATIE DANS LA MONDIALISATION 8 (1999).

77. *Id.*

of others. The *locus classicus* of the view that individuals and the body politic must pursue the general interest is *The Social Contract* by Jean-Jacques Rousseau.⁷⁸ According to Rousseau “the general will alone can direct the forces of the state in accordance with that end the state has been established to achieve—the common good.”⁷⁹ Furthermore, “[t]here is often a great difference between the will of all [what individuals want] and the general will; the general will studies only the common interest while the will of all studies private interest, and is indeed no more than the sum of individual desires.”⁸⁰ In addition, “if the general will is to be clearly expressed, it is imperative that there be no sectional associations in the state, and that every citizen should make up his mind for himself.”⁸¹ As for law, “the province of the law is always general . . . the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action.”⁸²

The French conception of democracy differs significantly from the predominant American view, as expressed by James Madison in *The Federalist Papers, Numbers 10 and 51*. According to Madison, it is simply unrealistic to seek to eliminate the causes of faction, for “the latent causes of faction are . . . sewn in the nature of man.”⁸³ By “faction” Madison means “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁸⁴ In other words, factions pursue the private interests of the citizens who compose them. Since faction is unavoidable, its effects must be controlled.⁸⁵ To control faction, or the effects of individuals pursuing their private interests at the expense of the general interest, “[a]mbition must be made to counteract ambition.”⁸⁶ This can be accomplished “by comprehending in society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very

78. On Rousseau, see Rogoff, *Constitutionalism in France*, *supra* note 70, at 50-55.

79. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 69 (Maurice Cranston transl., 1968).

80. *Id.* at 72.

81. *Id.* at 73.

82. *Id.* at 81-82.

83. JAMES MADISON, *THE FEDERALIST PAPERS*, NO. 10 (Clinton Rossiter ed., 1961), at 79. “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” JAMES MADISON, *THE FEDERALIST PAPERS*, NO. 51 (Clinton Rossiter ed., 1961) at 322.

84. *THE FEDERALIST PAPERS*, NO. 10, at 78.

85. *Id.* at 80.

86. JAMES MADISON, *THE FEDERALIST PAPERS*, NO. 51 (Clinton Rossiter ed., 1961) at 322.

improbable, if not impracticable."⁸⁷ The American view, then, is to approve of, encourage, and facilitate the advocacy of private interests.⁸⁸

For Eva Joly, the pursuit of private interests by those in positions of power "destroys the necessary confidence between the citizen and his representatives."⁸⁹ This is particularly dangerous because "the democratic pact rests on mutual confidence."⁹⁰ "If the law is concerned only with employees and small businessmen, while a part of elite executives are freed from all the rules, it is the social contract that has to be completely revised."⁹¹ In the words of Rousseau, "if ever the social pact is violated, every man regains his original rights . . . recovering his natural freedom."⁹²

While in theory Joly's fears for French democracy appear well-founded and reasonable, France has had a long, aristocratic tradition which has countenanced, or at least tolerated, the self-interested behavior of those in positions of power. As explained by Pierre Lascoumes:

The culture of political impunity which has prevailed for two centuries in France can be explained in large part by the weakness of our democratic system which accords few powers of action to citizens, to the benefit of highly-structured executive, political, administrative groups, who regulate themselves surrounded by great opacity. . . .⁹³

The real problem for democracy in France, then, is not necessarily its decline in the new world of globalization and deregulation, but rather its very nature and its very practice itself. What is the proper relation of the people to their representatives and to the state? Should the representatives of the state and those holding other positions of power in society continue to enjoy an impunity of position? Joly's actions in aggressively pursuing her investigations into the questionable financial and political actions of government officials and corporate leaders and her forceful articulation of her reasons for doing so in *Notre Affaire à Tous* represents in practice the emergence of a new conception of the responsibilities of those in power, a conception that is more compatible with the exercise of power in a

87. *Id.* at 324.

88. For a comparison of the European and American views of democracy, see GUÉHENNO, *supra* note 76, at 145-68.

89. JOLY, *supra* note 3, at 21.

90. *Id.*

91. *Id.* at 22.

92. ROUSSEAU, *supra* note 79, at 60.

93. LASCUMES, *supra* note 2, at 159; see also GUÉHENNO, *supra* note 76, at 158. Michel Crozier, in his classic study, describes French society as an "ascriptive society . . . [t]hat is a society in which each person is assigned a place and function, not according to what he has achieved or seems capable of achieving but in terms of his status and rank of origin." MICHEL CROZIER, *THE STALLED SOCIETY* 110 (1970).

contemporary European democratic society.⁹⁴ Joly is in effect arguing for the modification of the French social contract.

V. CONCLUSION

Joly concludes on a hopeful note. The *Appel de Genève* and the cooperation French investigators have received abroad are heartening. Most important, however, is her belief that a "new democratic model" will emerge in response to the economic and political changes of the new financial and political world which she has described. "This new democratic model will not be a super nation-state, a gigantic extrapolation of our nation-state on a continental scale. It will rather be composed, like today's world, of networks, of places for the settlement of disputes, of decentralized procedures; in brief, of a new political and legal architecture. All is to be invented."⁹⁵ Although politicians have more legitimacy than magistrates to design this new institutional structure, judicial officials have an important role to play. Perhaps most importantly, their efforts in combating financial crime and political corruption expose the public to the reality of what is going on in the complicated, and usually inaccessible, worlds of high finance and technical governmental decision-making.⁹⁶ As Joly puts it, "we are, like the silver nitrate bath which fixes the negative, the photographic developer of the society in metamorphosis."⁹⁷

Joly is also optimistic about the development of new values among the young magistrates who are now entering public service.⁹⁸ She points out that the 1996 graduating class from the *École de la Magistrature*

94. See LASCOUMES, *supra* note 2, at 160.

95. JOLY, *supra* note 3, at 225.

96. NOTRE AFFAIRE À TOUS was the fourth best-selling work of nonfiction in France in the year 2000. *Les meilleures ventes de livres en France pour l'année 2000*, LE MONDE, Mar. 12, 2001.

97. JOLY, *supra* note 3, at 227.

98. One young assistant public prosecutor is quoted as remarking that "it is better to live in the Van Ruymbeke era than in the Lambert era." Jean-Michel Dumay, *La lutte contre la corruption: Le réveil des juges*, LE MONDE, Oct. 24, 1994. The magistrature is changing: it is younger (more than 50% are now under 40 years of age, compared with 13% in 1979); there are more women (44%, and 70% of those recruited in the class of 1993, compared with 30% of those recruited in 1970); more magistrates are interested in financial matters. A real *esprit de corps* is developing. "One is witnessing less a seizure of power by judges than the replacement of declining moral authority with judicial authority." *Id.* Pierre Lascoumes attributes changes in the magistrature and the *police judiciaire* to the entry into those professions of "persons of middle class origin, educated in a more complete and less conformist way than their elders, . . . The access of such persons to responsible positions in the hierarchy . . . is modifying in a slow, but decisive, manner these professions, their values, their ways of working, and their positions in the social context." LASCOUMES, *supra* note 18, at 212-13.

baptized itself *Appel de Genève* and that in that same year more students from the prestigious *Institut d'Études Politiques (Sciences Po)* took the entrance examination for the magistrature rather than the *École Nationale d'Administration*.⁹⁹ But ultimately, she concludes, it is up to the French people: "if financial criminality doesn't become everyone's business, I doubt that we [the magistrature] will succeed alone in warding off its perils."¹⁰⁰ *Notre Affaire à Tous* is a *cri du coeur* directed to the French people to make financial criminality "everyone's business."

99. JOLY, *supra* note 3, at 227.

100. *Id.* at 228.