

Presentation to the Senate on the CARIBBEAN COURT OF JUSTICE

Senator Alexander Williams

Friday October 16, 2015

Mr. President,

The Government of Jamaica is seeking by these 3 bills the (Amendment) (Caribbean Court of Justice) Bill, the Constitution Judicature (Appellate Jurisdiction) (Amendment) Bill, and the Caribbean Court of Justice Bill, to establish the Caribbean Court of Justice as our final appellate court.

This will be the government's second attempt to do so, the first attempt being to do so by an ordinary parliamentary vote.

Similar to the last occasion, there is a bill which gives the agreement which established the CCJ, the force of law in Jamaica (the Caribbean Court of Justice Bill) a bill removing the Judicial Committee of the Privy Council as the final court (The Constitution Amendment Caribbean Court of Justice) Bill, specifically at s.13 of the bill), and to deal with procedural matters concerning criminal appeals consequent on the change (The Judicature (Appellate Judicature) (Amendment) Bill).

Unlike the last occasion, the government seeks to establish the Caribbean Court of Justice by a 2/3rd majority of both houses, which would make the CCJ ordinarily entrenched, like the existing Court of Appeal.

The Caribbean Court of Justice is a treaty court, established with the agreement of several Caribbean nations whose track record of cooperation on several Caribbean institutions can be debated.

We, Mr. President, need to appreciate in this debate, that our constitutional arrangement is that the legislature must submit itself to the provision of the constitution, and who is to see to it that this happens?

This can only be done ultimately by our final court, which would have the authority to ensure that laws are not passed that breach the letter, spirit and intention of its provisions.

It is therefore important that the final court enjoys the greatest level of protection if it is truly to fulfill that role. Can we safely leave our final court

subject to a 2/3rd vote of parliamentarians whose mandate gained from a general election, may not necessarily represent the will of the Jamaican people?

I agree, Mr. President that it is time, after 53 years of independence to being our sovereignty home and by home I mean Jamaica. This must necessarily mean ending appeals to the Privy Council.

I remain unconvinced, Mr. President as to why, on a matter so important as this, we should not seek to establish the will of Jamaicans.

As I have said Mr. President, in previous speeches in this house, wouldn't it be proper for the final court, the final protector of the fundamental law of the land, to enjoy the deepest level of protection under that fundamental law? Of course, deep entrenchment requires a referendum.

It is important to note, as did the Privy Council in the case of **Independent Jamaica Council for Human Rights (1998) Limited et al v Hm. Syringa Marshall-Bennett et al** that there is recognition of a need for entrenchment, even with the CCJ. The Agreement in its Protocol states that the contracting parties are convinced of the desirability of entrenching the court.

Mr. President, we need to be very careful about what we are doing. It is my view that our final court should be deeply entrenched to protect it from any possible interference by our political parties who might jointly dislike its decisions, and seek to remove it by a 2/3^{rds} majority vote in parliament. The Privy Council also has warned us that there is a risk, though it may be a minimal risk, that the governments of the contracting parties might amend the CCJ agreement so as to weaken the court's independence.

Our constitution has as an important function, to protect its citizens against governmental excesses, and parliamentary misbehaviour.

So, in the same way that, over time, steps have been taken, by the contracting parties to strengthen the Caribbean Court of Justice, by changing the structure for the appointment of Judges, the reverse can easily happen when contracting parties, by a majority, might seek to restructure that court, according to national interests that favour the majority of the contracting parties.

I ask the question, Mr. President, will the national interest of the majority of the contracting parties necessarily align with Jamaica's national interest?

Furthermore, it is not healthy for there to be a continuing debate about whether the CCJ is properly funded in perpetuity. In January 2014 one Judge has called for a review of the US\$100 Million trust fund that was needed to set up the court citing the changing world financial climate and the need to revisit the court's operations.

The simple point I wish to make here Mr. President is that for our constitutional arrangements. I feel that our final court needs to be a deeply entrenched court, and it would be dangerous to deeply entrench a treaty court, subject to the will of the majority of other nations. However, if Jamaica is willing to take that risk, it should be with the approval of the Jamaican people. Hence, a referendum is what we should have.

Mr. President, the Jamaican people need to understand very carefully what the implications are, in having a court, such as the CCJ being our final court. I, in my speech here today, have outlined only some of the implications, that is, a court, if set up by a 2/3rds majority of parliamentarians can be changed by a 2/3rds majority of parliamentarians; a court, that ultimately, is subject to the will of the majority of other Caribbean nations who may not always see eye to eye with us.

The real solution, Mr. President, is to truly bring our sovereignty home, here to Jamaica, not London, not Port of Spain, but here in Jamaica. It solves all the arguments about our final court engaging the deepest level of protection. It solves all the arguments about access.

We could even use an institution similar to the Regional Judicial and Legal Services Commission to see to an independent process of appointing judges, and even invite judges from other commonwealth countries to sit on the panel.

So, I ask the question, do we know if the Jamaican people want the CCJ? Would it be prudent to proceed in the way contemplated by these bills without really knowing what the Jamaican people want?

I can tell you what the Jamaican Bar Association had to say about this, in 2000, in their position paper of 9th March 2000.

“Finally, the Council is of the view that the decision to change the constitution with respect to final appeals should not take place without reference to the Jamaican people. In the Council's view, the right of final appeal to the Privy Council is of fundamental

importance to each Jamaican; the Council recommends, therefore, that the question concerning whether appeals to the Privy Council should be terminated is one which must be put to the Jamaican electorate in a referendum. The Council notes that a Referendum on this question is not required as a matter of Jamaican constitutional law, however, having regard to the significance of this matter to the individual Jamaican, the Council is firmly of the view that a change in the present arrangement should be made only upon the affirmative vote of the electorate".

I am aware that the position of the Jamaican Bar Association has changed over time, and I know that position was driven by the then existing provisions in the CCJ agreement which called into question the independence of the Judges because of the provisions then made. I know those provisions have changed, particularly with the creation of a Regional Judicial and Legal Services Commission.

But what argument is there to no longer require the affirmative vote of the electorate?

There are several advantages to holding a referendum. It will give our people a greater sense of involvement in constitutional reform. It would serve to educate and sensitise them on our judicial system. It would generally help to strengthen our people's faith in our democratic system.

The referendum would settle the issue, and be a protective device and a safeguard against a controversial decision.

It is better, in a modern memorandum, to seek out the will of the people, especially on an issue such as this.

If after all the concerns raised, the Jamaican people feel that they are willing to go with the CCJ, so be it.

I for my part, am not prepared to take the risk, of foisting the court on the Jamaican people without knowing what they want and, for my part, I think it is a pity that this approach has been adopted by the government of Jamaica, of relying on the vote of at least one opposition senator to make so fundamental a change to our judicial system.

Mr. President, I recognize my role here in this Senate, and I take my role as a senator very seriously.

I agree that the CCJ has excellent jurists and is to be credited for well reasoned decisions.

Yes, we must remove ourselves from the Privy Council, but that doesn't mean that we should set up a court which, in my own view, is not the best fit into our constitutional arrangements, and for which I have serious doubts reflects what our Jamaican people want. Indeed, some civil society organizations are actually engaged in the debate, wanting their collective voices to be heard.

The same courtesy must be given to the ordinary Jamaican.