Equal marriage after the US decision

In my opinion

by David Hughes

It is only a short time ago that I wrote in this newspaper in answer to Eric Ellul's courageous but unconvincingly reasoned attack on those who want to see gay couples free to marry.

On Friday, the United States Supreme Court ruled that the 14th amendment to that country's constitution requires that gay people have the right to marry on the basis as heterosexuals. People the world over have reacted to this decision. Some of us have put rainbow colours over our Facebook profile pics, to indicate that we are happy for gay Americans and that we celebrate their win. Curmudgeons may lament that a decision of 5 American judges (out of 9 – the others dissented) is getting such global attention, fearing American cultural hegemony. Those who think that gay marriage will cause the sky to fall in will be casting their glances upwards – despite no skyfalls recorded over (or should that be onto?) Spain, the Netherlands, Canada or England & Wales. I write not to gloat that a court has preferred my views over those of Mr Ellul – neither of us presented argument and it was no more his defeat than it was my victory – but to consider whether the ruling may have any possible impact on Gibraltar.

The answer is an emphatic maybe (if that is not a contradiction). The court based its ruling on the 14th amendment to their constitution. Passed in 1868, its best known words (in fact, only part of s1) are;

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In other words, the States have got to give people the equal treatment of the law.

The dissenting judgments focused on the allegedly undemocratic character of five judges making a decision for a whole country, when different states had been making their own decisions on the subject. This is not, at first blush, an unattractive argument. It becomes unattractive when one remembers that the democratic process did not halt segregation in schools or the banning of a black person marrying a white one in certain states. And as legal argument, it is weak. The whole point of putting certain rights in constitutions is that they are considered so fundamental that the legislature should not be free to take them away (or not grant them).

Although the Gibraltar Courts usually look to those in England & Wales when there is no binding Gibraltar precedent, they will look at American decisions when appropriate. It makes sense for judges in other common law countries to look at how ones in others have dealt with points that come up. In Rojas –v- Berllaque, the Gibraltar Courts (up to and including the Privy Council) considered American decisions which had held that all-male juries were not acceptable, and those decisions played a significant part in the ultimate outcome. Internet legal research was not easy in those days, but I'd bought a book on juries when on a scholarship to the USA a few years earlier …

So, will this decision be followed in Gibraltar? I hope an attempt will be made to get the Gibraltar Courts to follow it. The argument will not necessarily be easy, but s14 of Gibraltar's Constitution has been held to prohibit discrimination on the grounds of sexual orientation, and S15 provides for the right to marry. The latter's wording starts "men and women of marriageable age …", but this provision is subject to the prohibition on discrimination in s14 and, in any event, "men and women of marriageable age" does not, as a matter of language, exclude men from marrying men and women from marrying women. Of course, Parliament could introduce marriage equality and make the legal argument moot. But as so many court decisions show, the law often has to make up for the failings of the democratic process.