Pakistan's legal system has long been associated with human rights violations. In particular, the controversial Zina Ordinance, which made sexual intercourse outside marriage a criminal offence. The most pernicious result of this law has been the risk for 'double jeopardy' of rape victims. A woman pressing rape charges risked being convicted of adultery if the suspect was acquitted. The infamous case of Safia Bibi, is the most distressing example of this scenario. Yet, as Martin Lau reveals, there have been gradual improvements in the legal position of Pakistan's women in recent years.

Photograph courtesy of Kristoffel Lissen.

The quiet evolution: Islam and women’s rights in Pakistan

Safia Bibi was a blind, unmarried, girl, whose pregnancy was visible proof of sexual intercourse. She accused her employer, a landlord in rural Sindh, of having raped her. At the trial, her employer was acquitted, but the court proceeded to sentence her to imprisonment. On the basis of being pregnant and unmarried, and her charge of rape unproven, she was guilty of unlawful sexual intercourse. Following international protests, Safia Bibi was eventually acquitted by the court of appeal. However, the rule of evidence that the pregnancy of an unmarried woman was admissible evidence in an accusation of Zina, was left undisturbed. The Zina Ordinance also led to the imprisonment of large numbers of women who had been rejected by their husbands without having been validly divorced. On re-marriage, the former husbands brought accusations of adultery against them, claiming that there had been no divorce, and that therefore their ‘wives’ were committing adultery. In addition, the issue of so-called honour crimes - women murdered because for allegedly dishonouring their families through immoral conduct, and forced marriages - has further tarnished the reputation of Pakistan's legal system in relation to the rights of women. Mention must also be made of Muslim family law as applied by Pakistan's courts, which discriminates against women in many areas, such as inheritance rights and divorce.

Perhaps surprisingly, the democracy which followed the lifting of martial law and the subsequent death of Zia ul Haq in 1988, increased, rather than decreased, the role of Islam in the legal system. In the decade preceding General Musharraf’s regime - 1988 until 1998 - the two ruling parties, led by Benazir Bhutto and Nawaz Sharif, failed to improve the legal position of women. They lacked the will but also the parliamentary majorities required to reverse the current of Islamisation. This, however, tells only half of the story, it omits the important role Pakistan’s courts have played in controlling the fate of Islamic law.

The Federal Shariat Court

Most important in determining the position of Islamic law in the legal system was the Federal Shariat Court (FSC). Created, in 1980, to act as the court of appeal in all cases involving the Hudood Ordinances, the court was given added jurisdiction, namely the power to invalidates laws deemed to be contrary to Islam, as laid down in the two main sources of Islamic law, namely the Qur’an and the Sunnah. Any member of the public could approach the FSC and lodge a complaint that a particular law violated the teachings of the FSC and that it should therefore be struck down. Moreover, the new court could also examine statutes ‘a'oo mol’, meaning that it could move itself and review a statute. This new jurisdiction was unprecedented in the legal history of Pakistan, and no other country had given its courts such wide powers.

Until the creation of the FSC, only the four high courts and the Supreme Court of Pakistan had the power to invalidate laws, and then only on the grounds that they violated the constitutional fundamentals of the country. Restrictions were imposed on the types of law which the Supreme Court of Pakistan had the power to invalidate – and the FSC could examine, but overall the effects of the rulings of the Federal Shariat Court on the legal system have been profound.

Most visible is the court’s impact in the area of criminal law, where the government was forced to pass the Criminal Law (Amendment) Act 1997 in order to bring the law on murder and assault in line with Islamic law. As a result, the heirs of a murder victim now have the right to determine the fate of the murderer. They have three options: Firstly, to demand that the murderer is punished; secondly, to agree that he pays a sum of money as compensation, in return for which he escapes punishment; and lastly, to pardon him. A recent PhD thesis concluded that on average eight for ten convicted murderers avoided imprisonment, or indeed the death penalty, because they were able to pay monetary compensation to the victim’s family. Whilst the
new law can be seen as being supportive of the idea of restorative justice, and also as being in line with the customs of Pakistan’s tribal areas, the consequences of this legislation have been particularly unfavourable for women, many of whom were killed by members of their own family in the name of honour. In a case where a brother had murdered his sister, it was the father who could pardon his son.

Terror of the tide
Towards the end of the 1990s, after a decade of democracy, the legal position of women living in Pakistan had become worse rather than better. It is curious that matters only began to improve after General Musharraf overturned the government of Prime Minister Nawaz Sharif and imposed a state of emergency. In what can be described as a quiet evolution, the tide of the Islamisation has turned, albeit in small, incremental steps. Amendments to Pakistan’s criminal law, in the form of several acts, have improved the legal position of women under criminal law. In addition, courts, including the Federal Shariat Court, have bolstered the rights of women in the area of family law and the right to equality. While the changes, which will be described in greater detail, have not revolutionised Pakistan’s legal system, they can serve as examples that it is possible to improve the legal position of women living under Muslim law without removing Islamic law from the legal system altogether.

The first significant measure taken by the government occurred in 2004, when the Criminal Law (Amendment) Act, 2004 was passed. The law extends the power of judges to punish a murderer who has killed in the name of honour. The sentence can be a maximum of 15 years imprisonment or the death sentence, and can be awarded irrespective of any payment of compensation or a pardon by the representative of the victim. In addition, the amended Article 311 of the Pakistan Penal Code, 1860 now provides for a mandatory prison sentence of 10 years for so-called honour killings. Aside from dealing specifically for the first time in Pakistan’s legal history with honour crimes, the Criminal Law (Amendment) Act, 2004 also made a first attempt at reforming the Zina (Enforcement of Hudood) Ordinance, 1979. It now provides that where a woman is accused of Zina, no police officer below the rank of a Superintendent of Police shall investigate such offence nor shall the accused be arrested without permission of the Court. This amendment is designed to reduce the number of women arrested and imprisoned on false charges of adultery, only to be acquitted on appeal, after having spent many years behind bars. A similar provision has also been introduced for the offence of blasphemy.

Redefining Zina
The 2004 amendment to the criminal law was followed by a complete remodelling of the law of sexual offences in 2006, when the National Assembly passed the Protection of Women (Criminal Laws Amendment) Act, 2006. The Act does not repeal the Zina Ordinance, and therefore extended by the Supreme Court of Pakistan in 2006. In [PLD 2006 SC 293] a wife’s suit for dissolution of her marriage, on the grounds that she had developed a hatred for her husband, had been dismissed by the family court and also by the Lahore High Court. The lower courts had consistently dismissed her application on the grounds that she had been unable to substantiate the alleged hatred and aversion. The Supreme Court, however, allowed her appeal and dissolved her marriage, holding that the fact that the lady had started a suit for dissolution of marriage “itself is demonstrative of the fact that the petitioner does not want to live with her husband which indicates the degree of hatred and aversion.” The precedent has been set: the act of asking for a divorce is evidence enough of a wife’s hatred and aversion towards her husband and the court has no choice but to grant the divorce.

Notes
1. For a thorough legal analysis of the Zina Ordinance see Jahangir, Asma and Meena Publications.
2. For a comprehensive review of these issues see the Pakistan section of Human Rights Watch, Global Report on Women’s Human Rights, New York, 1995.
3. The Hudood Ordinances were enacted in 1979 as part of Zia-ul-Haq’s Islamisation process. They were intended to implement Islamic Sharia law, by enforcing punishments mentioned in the Quran and sunnah for Zina (extra-marital sex), Qazf (false accusation of Zina), offences against property (theft), and prohibition (the drinking of alcohol).