



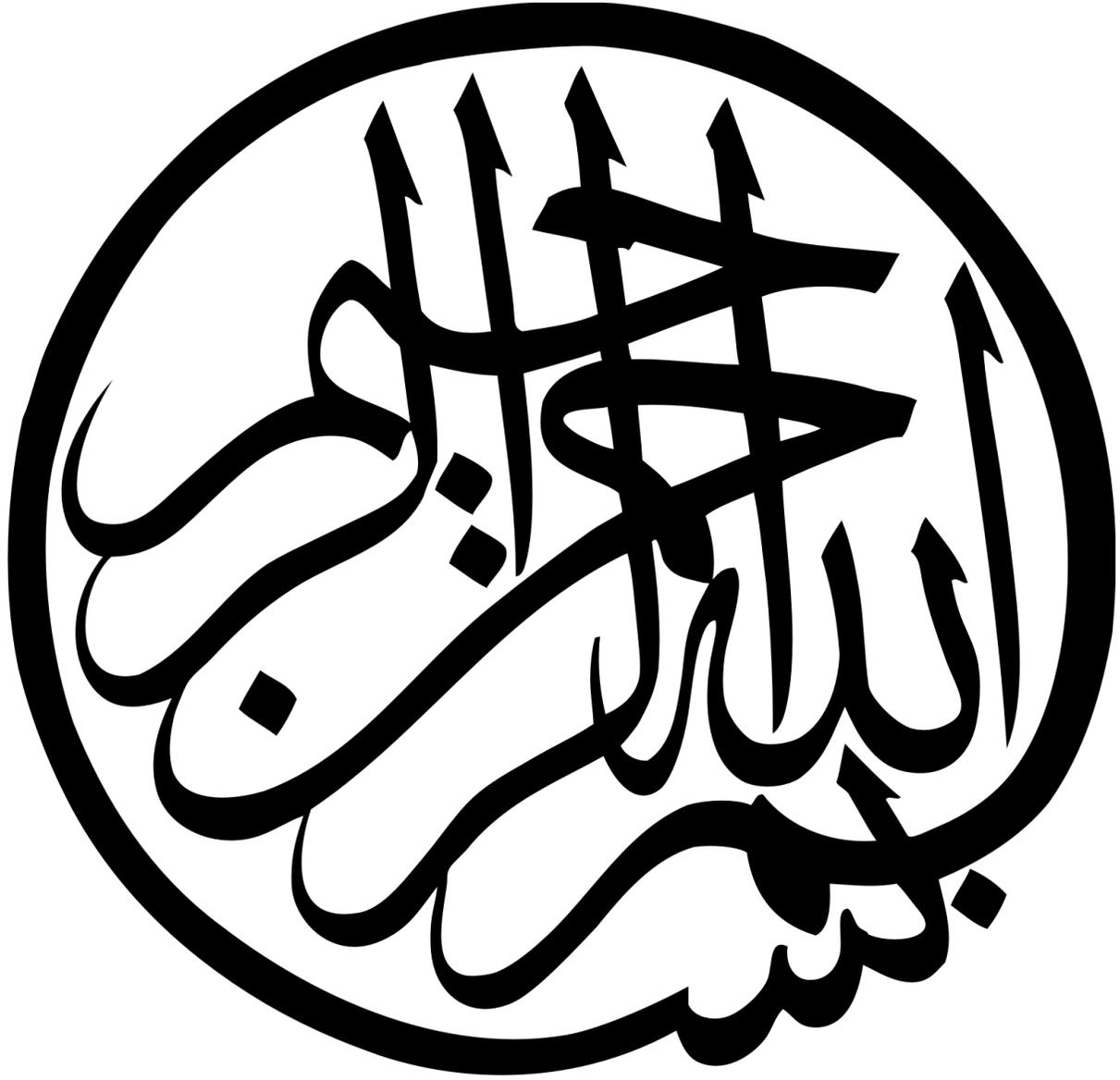
2014

Report

First TOT On “Mediation Skills”

Prepared by: Qazi Ataullah

Finalized by: Dr. Khurshid Iqbal



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Foreword

Honorable the Chairman, in informal discussion, has desired the Academy to conduct a series of trainings on amicable settlements of disputes. To materialize this vision, the Dean Faculty and his team burnt their midnight oil and succeeded to prepare a comprehensive manual for the program. I feel highly honored to claim that, in addition to a TOT on the subject, we have imparted 03 trainings on Mediation Skills to more than 65 judicial officers and lawyers.

The subject gets more significance when it is connected with the concept of Mobile Courts on one side and with the establishment of the Mediation Centre at the Academy on the other. I appreciate the faculty members for conducting the trainings successfully and also for preparing the reports well in time. I have gone through this report that is not only informative but readable as well. I hope that our readers would conduct further research on the foundation, we have laid.

Hayat Ali Shah,

Director General.

Faculty Note

Dispute is natural. As such, it cannot be eliminated from the society. What could be done humanly is that its birth maybe controlled and its continuation maybe clogged. Keeping this concept in view, a new department with the name of ‘‘Dost Muhammad Khan Mediation Centre’’ was established in the KP Judicial Academy. In order to materialize the objective of the centre, the Academy was tasked to prepare a manual for trainings on the subject. The Faculty proved successful in preparing the manual and has also succeeded to impart training to 03 groups; each consists of 20-25 judicial officers. Besides, TOT was also arranged where 13 participants including judges and advocates received training.

The significance of the topic is evident. The whole world is running towards the amicable settlement of disputes. The entire humanity is in need of ‘‘Resolution of Disputes’’ instead of mere disposal of issues through regular litigation. Empirical studies suggest that 80% of the disputes need not fixation of guilt. Moreover one should see the outcomes of the formal and informal techniques of adjudication. The main outcome of the regular adjudication is that it creates a bar to further litigation whereas informal techniques aim to uproot the very bone of contention and that too through a peaceful and consent - based modes. Resolution creates a state of cooperation and sympathy between the disputants. Formal decision, on the other hand, results in enmity and leaves the litigants in a state of antipathy, most oftenly amounting to more serious offensive issues.¹One should know that the concept of ‘‘victor’’ and ‘‘vanquished’’ is the real fatigue of regular justice systems. ‘‘Win Win’’ situation, created by amicable modes, is key to success. This principle differentiates between formal and informal modes of settling differences. It is therefore necessary to draw a distinction between ‘‘Resolution of Dispute’’ and ‘‘Disposal of cases’’.

Chief Justice Warren Burger, while addressing American Bar Association Conference, argued:

‘‘The notion that ordinary disputes want black-robed judges, well-dressed

Lawyers and fine-paneled courtrooms as the sitting to resolve their disputes

¹PC Markandee, *Arbitration, Law and Practice* (New Delhi: Wadhwa and Co. Law Publications, 1996)

is not correct. People with problems like people with pains, relief and they want it as quickly and inexpensively as possible”.²

Regarding treatment with dispute, Woodrow Wilson stated

“A dispute is a problem to be solved, together, rather than a combat to be won”³.

Informal techniques are, now-a-days, known as Alternative Dispute Resolution (ADR). The famous modes of ADR are arbitration, mediation, conciliation, and negotiation. Though our training program has been named as training on mediation, however, it shouldn't be taken as confined to mediation in its technical sense. The program encompassed all modes of ADR. The mediation skills were, nevertheless, focused in particular. The peculiarity of the course is that it carries the significance of amicable settlements under Islamic Law.

By now, we have a skillful team of mediators. Their expertise would be utilized in the Academy's Mediation Centre as well as in the respective courts. The Academy intends to continue on imparting trainings to a further considerable number of lawyers and judges in the near future, Insh Allah. By this way, we would be able to give a sigh of relief to those troubled litigants who have already fallen victim to a system full of complications, delays, uncertainties and back-breaking expenses. As a byproduct, we would also be able to reduce the huge pendency in courts, leaving the presiding officers to focus on cases that need fixation of guilt and are not fit for external informal adjudication.

Qazi Ataullah

Director Instructions – I.

² Bruno Deffains & Yannick Gabuthy, *Efficiency of Online Dispute Resolution: a case study*, page 201, available at <http://www.idate.org>

³ Christina SS Ooi, *The Role of Lawyer in Mediation* (research paper) 1.

Synopsis

Mediation Skills

By Barrister Isfandyar Ali Khan⁴

It is an accepted fact that mediation as an Alternative Dispute Resolution mechanism is a skill based form of dispute settlement. In order to impart skills based learning it is important that judges and lawyers are trained in basic understanding of ADR and who are able to gain specific knowledge of mediation process and phases of mediation.

The learning objective of Mediation Skills as a subject was to practically understand train the trainer's role of judges and lawyers who would serve as training team in strengthening the capacity of judges and lawyers on an on-going basis and be aware of procedures pertaining to mediation.

Following subjects were delivered during the ToT sessions:

1. Rationale of ToT Program and competency levels expected of training participants.
2. Comparison of ADR mechanisms (Litigation, Arbitration, Negotiation and Mediation)
3. Mediation Skills: Definition, Phases of Mediation, Settlement Agreements
4. Mediation Process: Case Referrals, ADR/mediation clauses and Enforceability mechanisms.
5. National Judicial Policy, PHC Judicial Esta Code, ADR Laws, ADR Law Reforms and Institutions for ADR.
6. Role Plays

The ToT candidates' interest in ADR and mediation was reflected in their continued discussion during the allocated sessions. Mediation skills as a subject was introduced through dissecting definition of mediation and later process and phases of mediation were explained in practical manner, especially ToT candidates were guided on case referral and mediation process in reference to the ADR Centre operating at Khyber Pakhtunkhwa Judicial Academy. Furthermore, characteristics and personality traits of mediator were explained in terms of independence and neutrality of mediator. It was highlighted that mediator cannot be judgmental and code of ethics need to be abided by a professional mediator. In Pakistani and Khyber Pakhtunkhwa environment questions pertaining to role and authority of mediator were also discussed. Discussion on ADR legal framework, ADR institutions (Karachi Centre for Dispute Resolution, Lahore Chamber of

⁴ *CEDR Accredited Mediator and Master Trainer*

Commerce and Industry mediation centre and Pakistan Mediators Association), ADR law reforms and required frame work for effective use of ADR/mediation took place which emphasized on greater need for institutionalized ADR in Khyber Pakhtunkhwa.

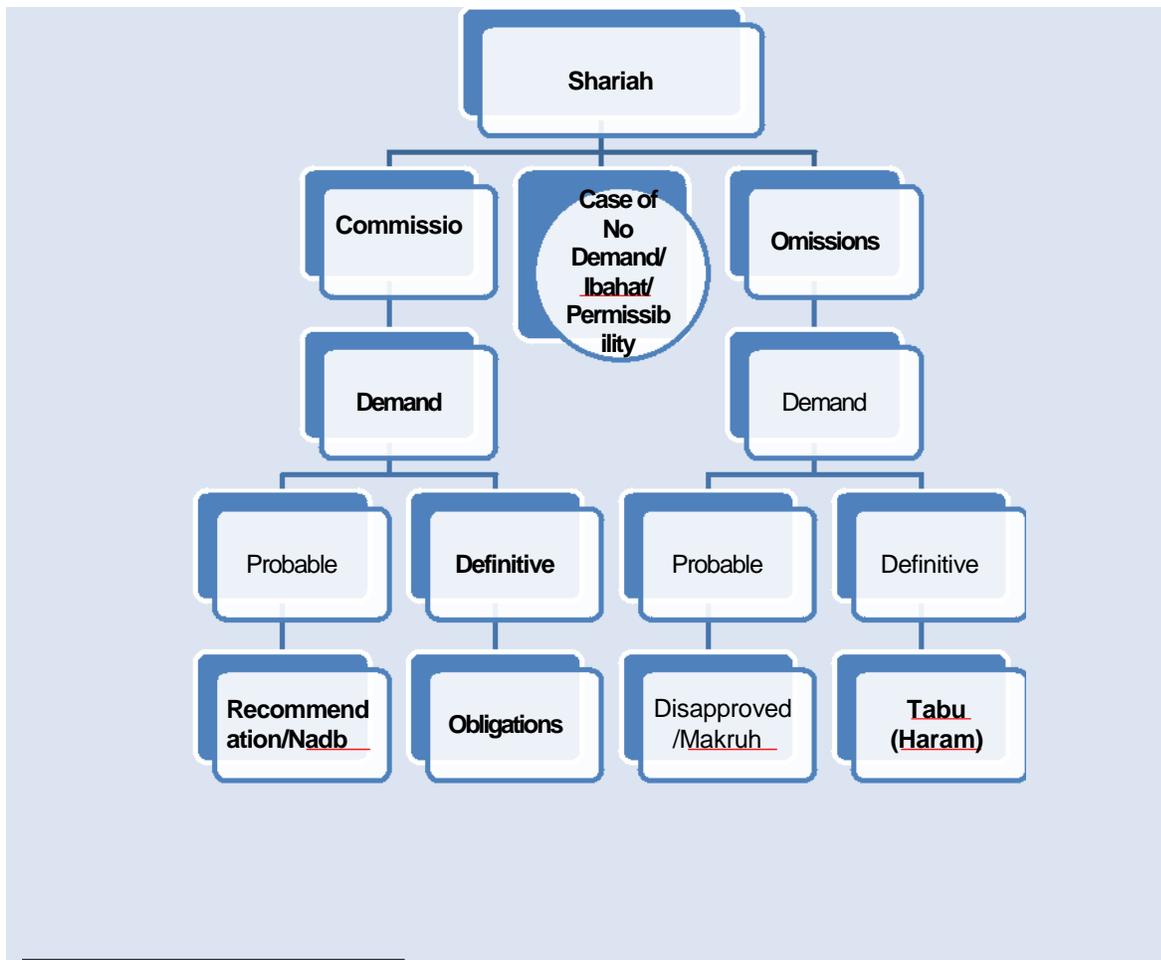
Alternative Dispute Resolution

By Qazi Ataullah⁵

Preliminaries-I

- Shariah (Literal and Technical Meaning).
- Fiqh; Islamic Law (Literal and Technical Meaning).
- Usul-ul-Fiqh; Islamic Jurisprudence (Literal and Technical Meaning).

Preliminary-II

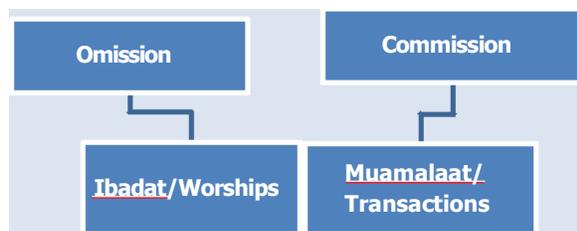


⁵ Director Instructions, KP Judicial Academy; Civil Judge; LLB (Distinction); LLM (Gold Medalist); PhD Scholar, International Islamic University, Islamabad.

ADVOCACY Meaning: Corresponds to *Wakalah* in, Islamic Jurisprudence. *Wakil* means a person representing another as an agent. It could not be confined to judicial issues, court proceedings and litigation. A contract of *Wakalah* may be concluded in respect of selling, buying, marrying and the like transactions such as *wakil bi al-shera*. *Wakil bi al-Khusmah* means an attorney for litigation. This attorney may be an advocate and may any other person, commonly known as *Mukhtar*. So *wakil* means an attorney of principal/client. Nonetheless pure worships and Hududs are exceptions. They demand the presence of actual party.

Advocate or Wakil;/Muhami in Arabic:

In the present system, *wakil* is two in one. He performs dual functions; the function of attorney and the function of *Mushir-i-Adalat* [amicus curiae/consultant of the court]. This makes his job tough and fragile for clash interest every now and then. In such cases, his later function must give way to the former, if not, it would amount to breach of professional conduct. Moreover he would be accountable before the Lord of lords for causing defeat to the noble cause.



Legality and History

In Shariah acts are of two kinds. Ibadat[worships] and Muamalat[transactions]. Shariah presumes that

All ibadat are unlawful unless there is provision for its commission.

All muamalat are lawful unless there is provision for its omission.

Wakalah is contract and as such is transaction. It is permissible if free from exploitation, fraud, misleading, misguiding, falsehood and any effort causing defeat of justice. Rightly guided caliphs, Umar, Uthman and Ali played the role of assistant of the court. Aqeel and Abdullah bin Jafar(RA) remained counsel of Ali in litigations. Umar revised some of his judgments

on the advice of Ali and so Ali played the role of amicus curiae and counsel of the convicts. Holy Prophet (SAW) also appointed some of companions as his attorneys though not far litigation. To help the aggrieved and to remove the effects of aggression and even to fight against aggressor [if warranted] are the foremost duties of believers, as mentioned in the Holy Quran. The concept of “Not to Fight for Aggressor” is the outcome on nearly eight verses of chapter 04 “the Women” of Quran.

Code of Conduct

Contractual Liabilities; Care of.[o believers: fulfill thy contractual liabilities]. Discussion on contracts and enforceable promises, a peculiarity of Shariah.

Honesty; significance and its priority over competency in Shariah, another peculiarity of *Shariah*.

Knowledge and Competency; the status of a person who adjudicates without the required knowledge. Status of the person who, due to his incompetence, gives wrong advice to Qazi/judge.

Judicial implications of article 2(a), after insertion in the constitution. Acquaintance of an advocate with Islamic Law and Islamic Jurisprudence, thereafter,

Tendency to ADR; the priority of resolution over litigation in *Shariah*. Recourse should be made to litigation as last resort. No role of advocate in ADR is wrong presumption. No consideration of procedural technicalities in ADR is correct presumption.

Concise and precise; advocate must not be known as talkative. He should speak according to the demands of occasions and audience. He is to explain and not to create confusion. He is to convince and not to compel. Any effort to cloudicate the mind of judge/qazi is professional misconduct. So advocate must avoid monotonous length as well as injurious brevity. Avoidance of lengthy meaningless statements, cross-examinations and arguments is must. No room for equivocal words. It is not the profession of tricts as commonly understood rather it refers to realities and clarities.

Confidentiality, the sacredness of secrets in *Shariah*. The status of person who discloses other’s secrets. Advocate is the trustee of client, hence any harmful disclosure would amount to breach of trust. Prophet Muhammad (SAW) said, “ The one from whom an advice is

solicited, is *Ameen*/trustee”.

Gentle in speaking; Quranic verse [And speak gently to the people], so many sayings of the Prophet Muhammad (SAW) regarding the use of language and care in the option of words. The behavior of advocate with court, client, opponent [defendant and his counsel], witnesses, and court staff should be up to the mark.

Wrong advice; avoidance of. To deceive is a sin. Wrong advice to the court amounts to an absurd decision. The validity of decree obtained as a result of rhetorical presentation of the case while the party is at wrong, is bad. Prophet Muhammad SAW said: “Some of you may be better presenters (in presenting their cases before me) than others. For the reason that I decide in furtherance of what I hear so (If I got misguided by such presentation) and would decide the case in favor of such party. So it (this decree) is like a piece of hell fire I am awarding to him.” Another saying is, “he who gives wrong advice earns the sin of such advice”.

Defense of Aggressor; Shariah’s view regarding advocacy of person whose aggression is known to the advocate. Quran says, “you must not give assistance to support the wrong and unjust”. “O believers, make not consultations amounting to sin, injustice and disobedience of the Messenger”. Prophet Muhammad (SAW) said, “ the one who facilitates an aggressor, is subjecting himself to the wrath and curse of Allah (SWT).

State of Mind; No submissions before court if state of mind is suffering.

Respect of Court; Respect of the court is *wajib*/mandatory. Prophet (SAW) once took notice of the litigant whose behavior was contemptuous [the case of a jew and Ibn-i-Zubair regarding irrigation dispute].

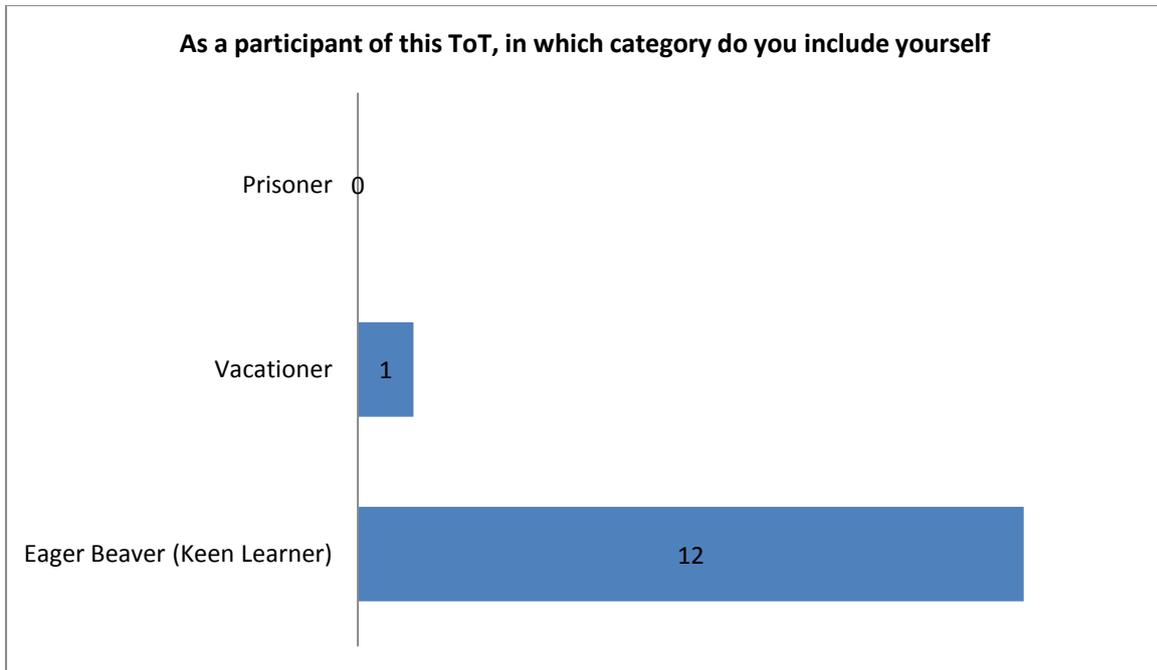
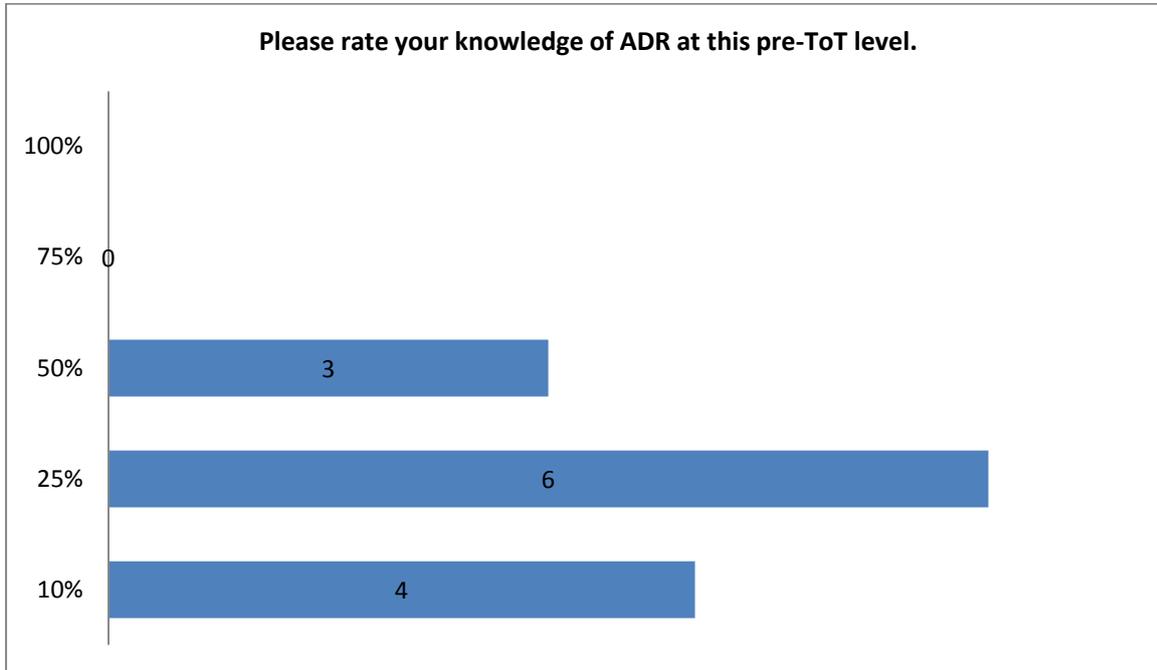
Truthfulness; sad to hear that lawyers are liars. Truthful is key to success and dignity. In Shariah, an advocate is required to adhere to truth even it may go against his client’s interests. A just decision can be arrived at if correct and true facts are presented to the court.

□ ***Advocate's Fee.***

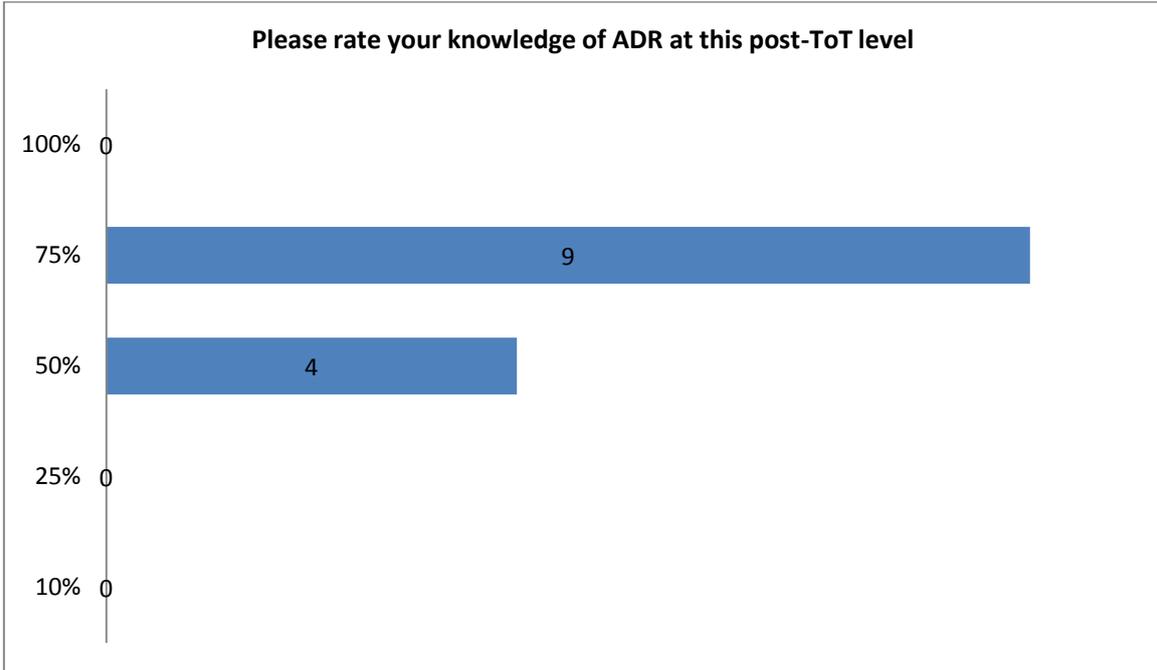
- Interference of the state in private issues.
- Govt. Policy regarding price control/Tasaer.
- Time of payment of the Fee.
- Sanction of Shariah, if fee is not Paid.

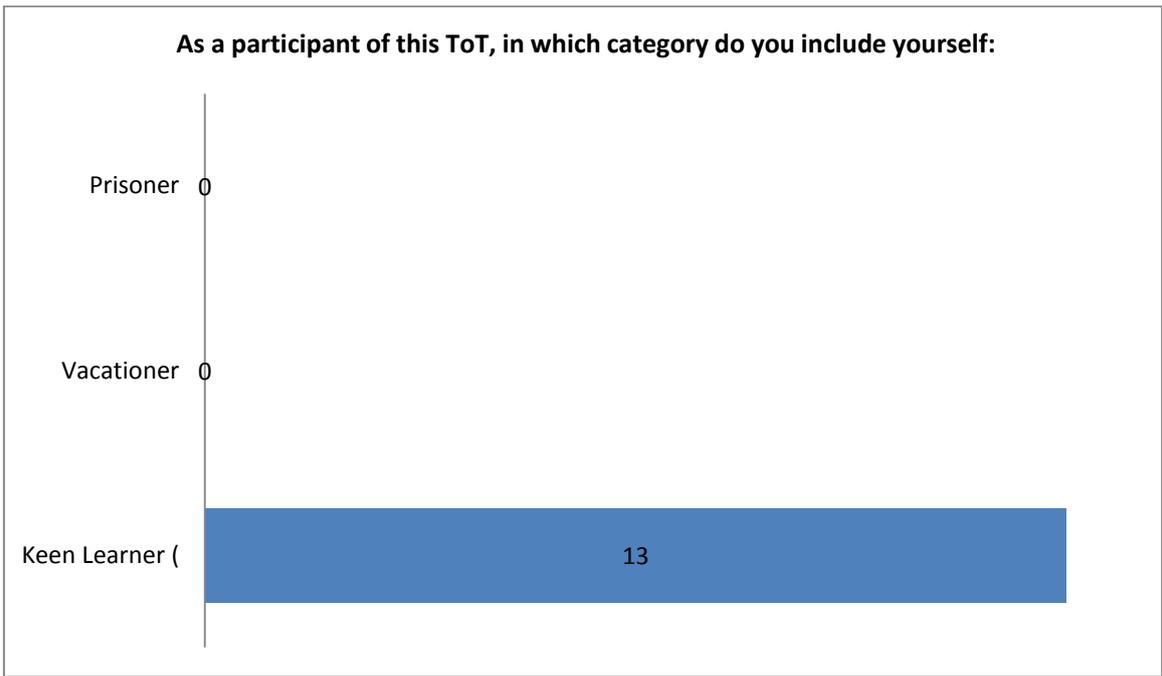
Evaluations

Pre Training Evaluation



Post Training Evaluation





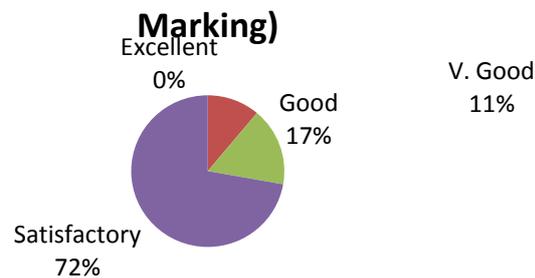
Comparative Statistical Statement of Pre & Post Training Evaluation

Pre & Post Training Open Ended Questions

- I. Give a proper definition to ADR
- II. What do you understand by the phrases “resolution of a dispute” and “adjudication of a dispute”?
- III. What do you know by the term acronyms “ADR” and “EDR” and “DRT”?
- IV. What terms are used for ADR in Islamic jurisprudence?
- V. What is the relationship between formal and informal dispute resolution in Islamic law?
- VI. List, at least, three various modes of ADR
- VII. List, at least, three advantages of ADR over formal litigation.
- VIII. Could Arbitration be included in modes of ADR?
- IX. Differentiate between mediation and conciliation
- X. List, at least, three mediation skills
- XI. .What reasons would you attach to lack of inclination to ADR in the formal justice system?

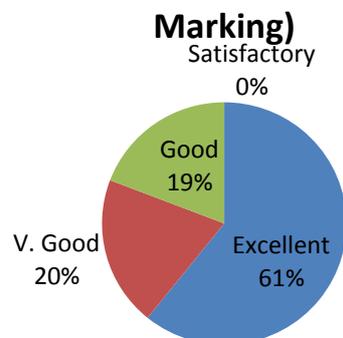
Pre Evaluation

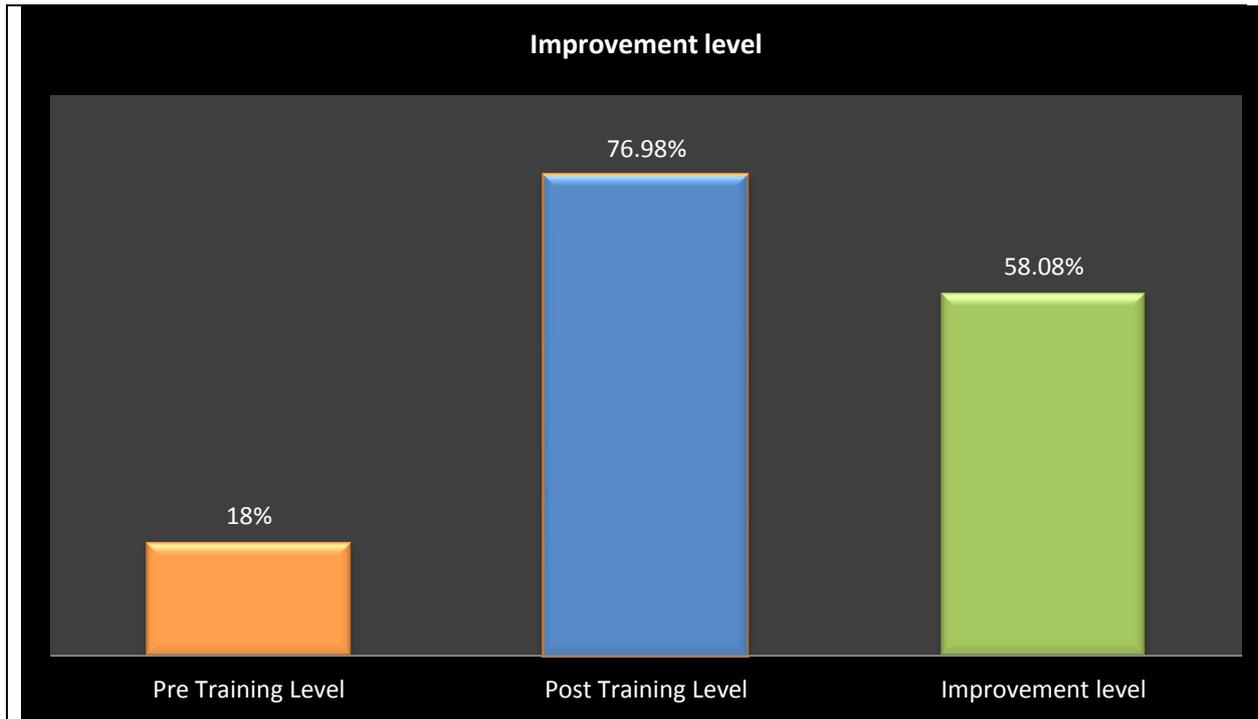
Pre Evaluation (Open Ended Questions



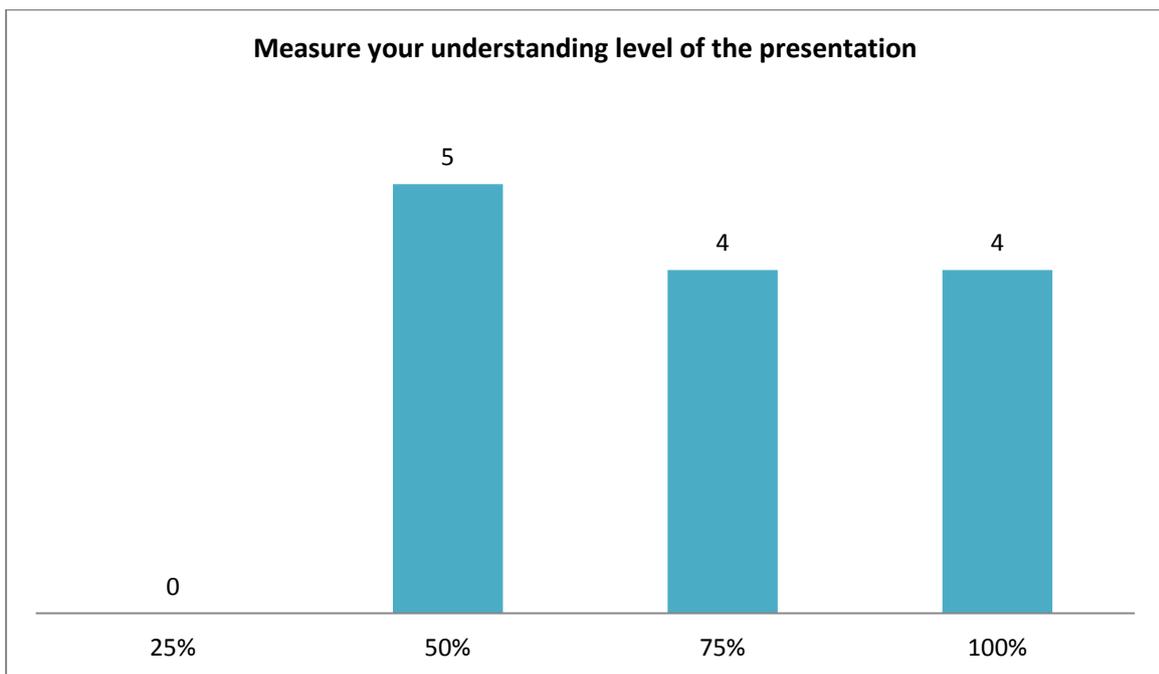
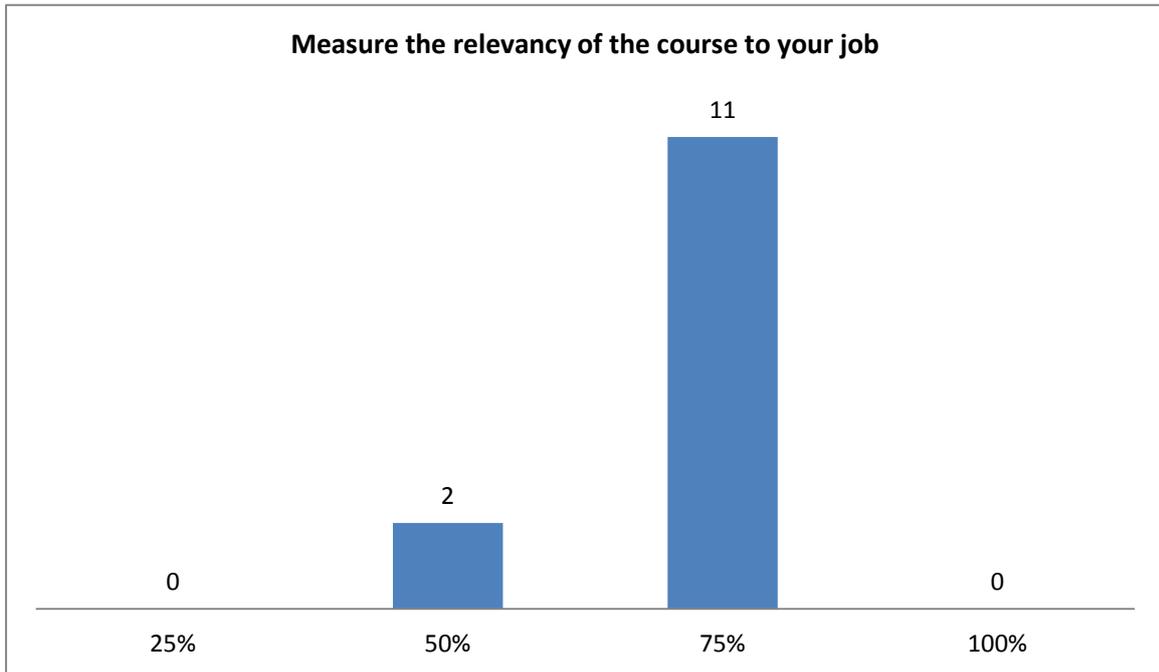
Post Evaluation

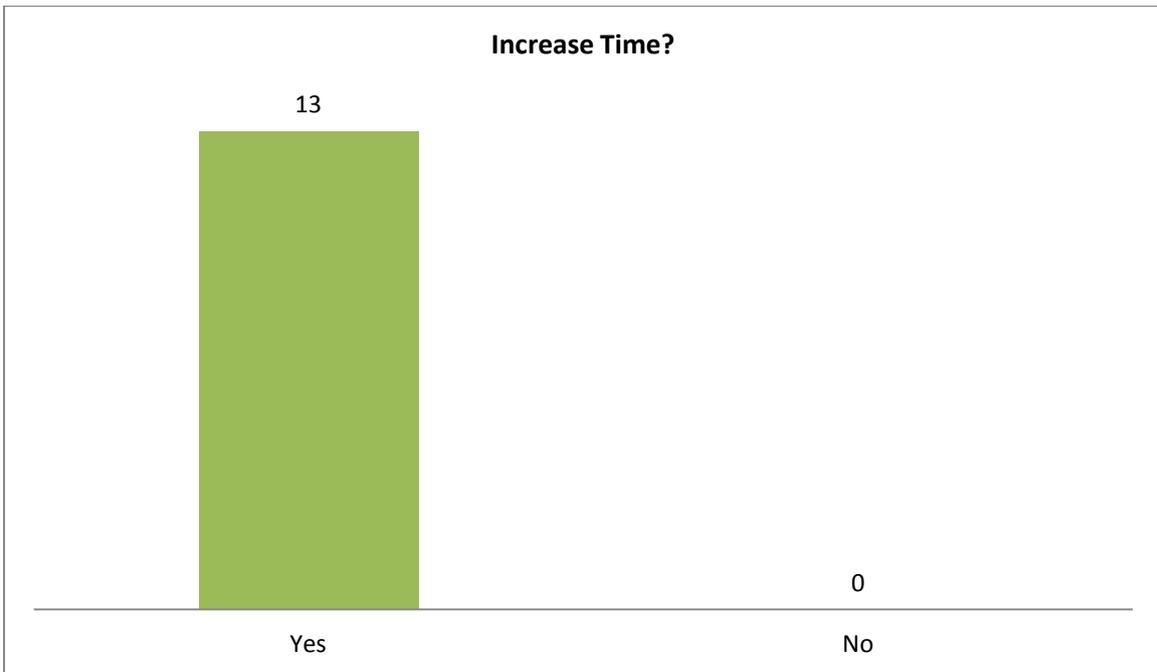
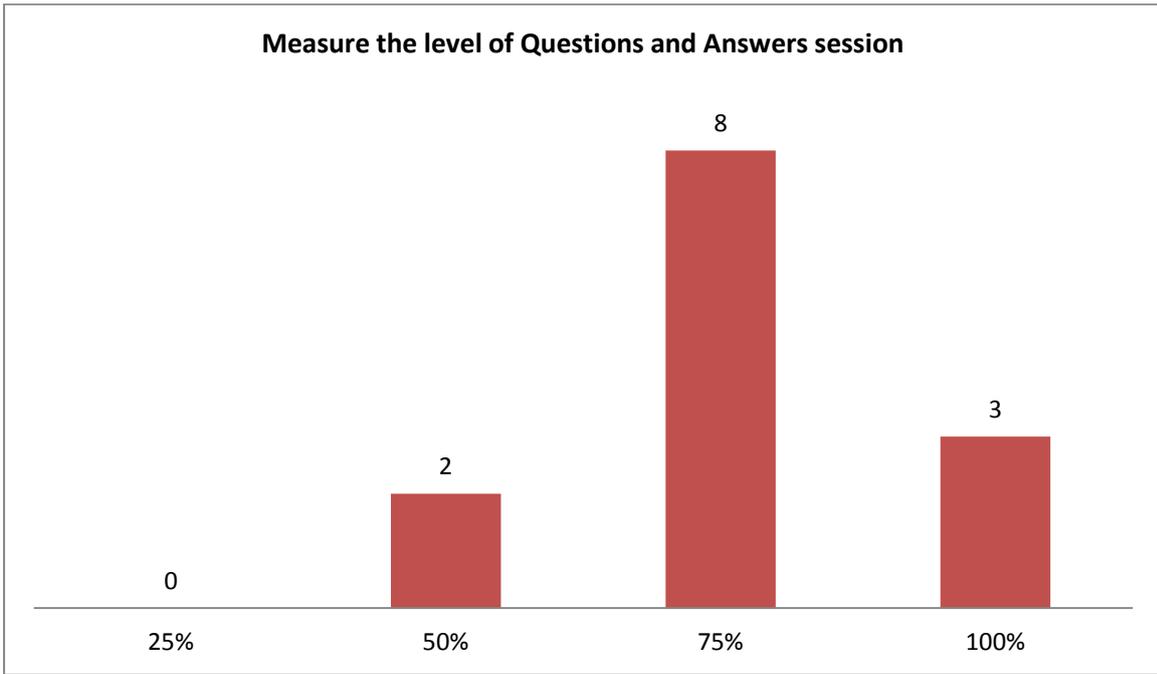
Post Evaluation (Open Ended Questions

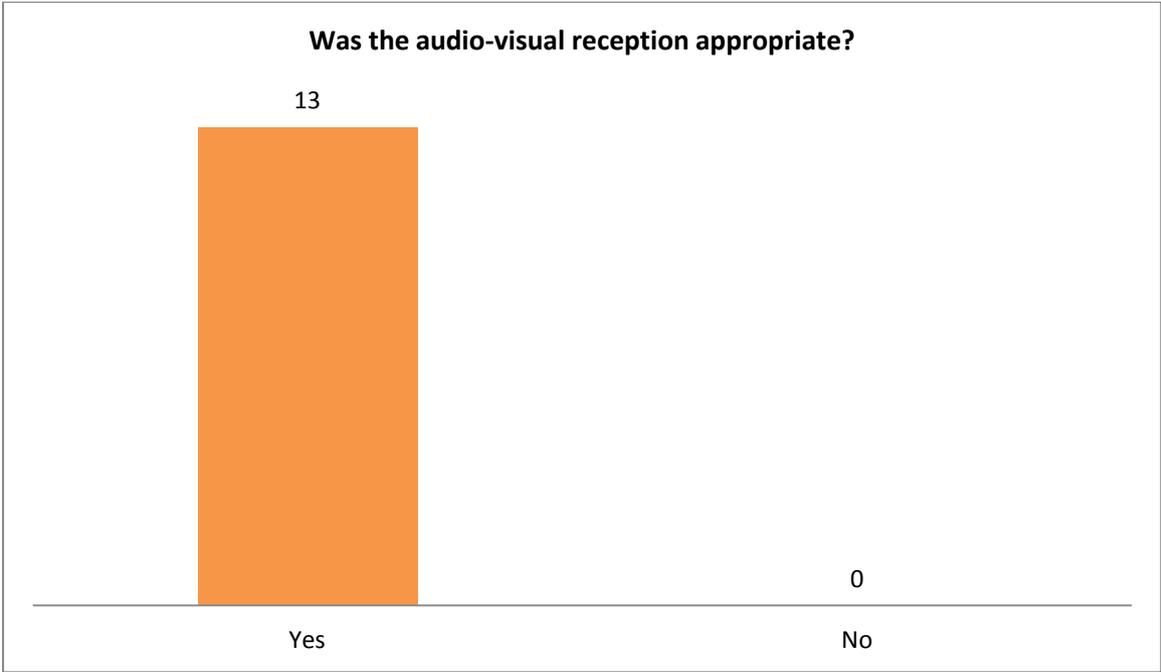
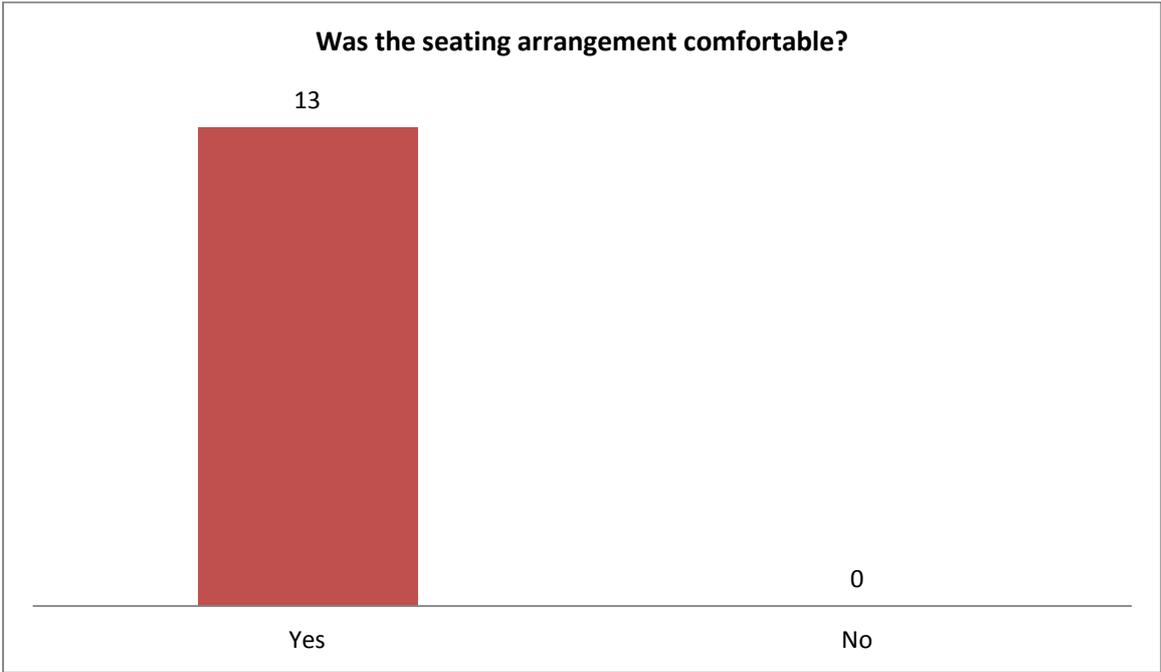


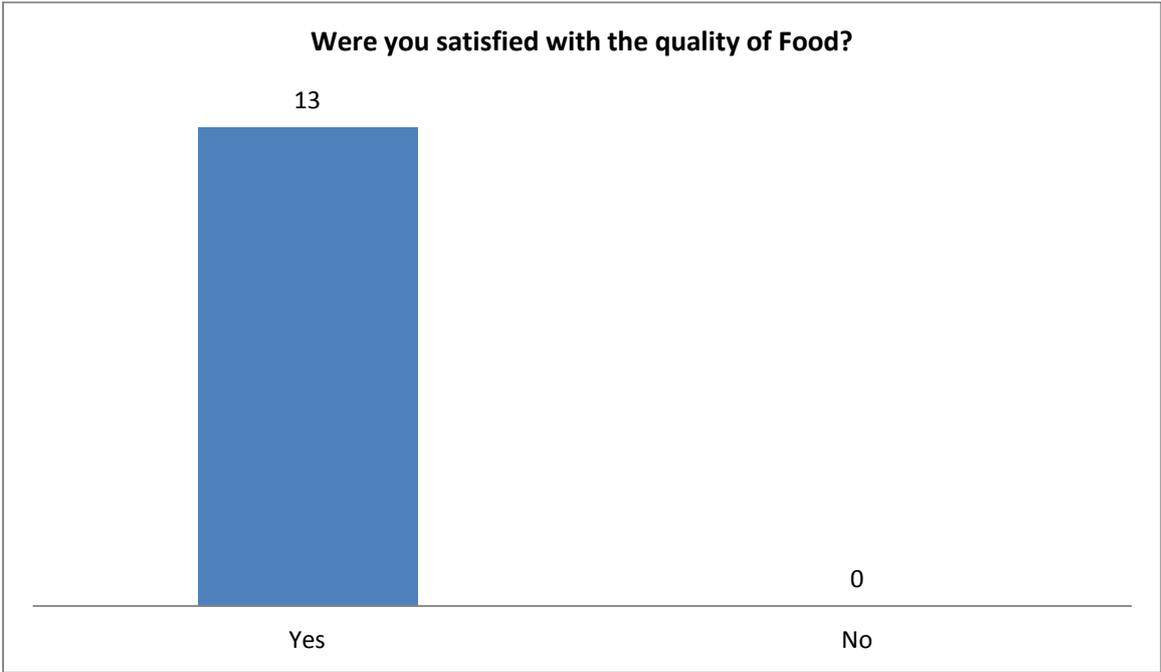


Over – All Training Evaluation

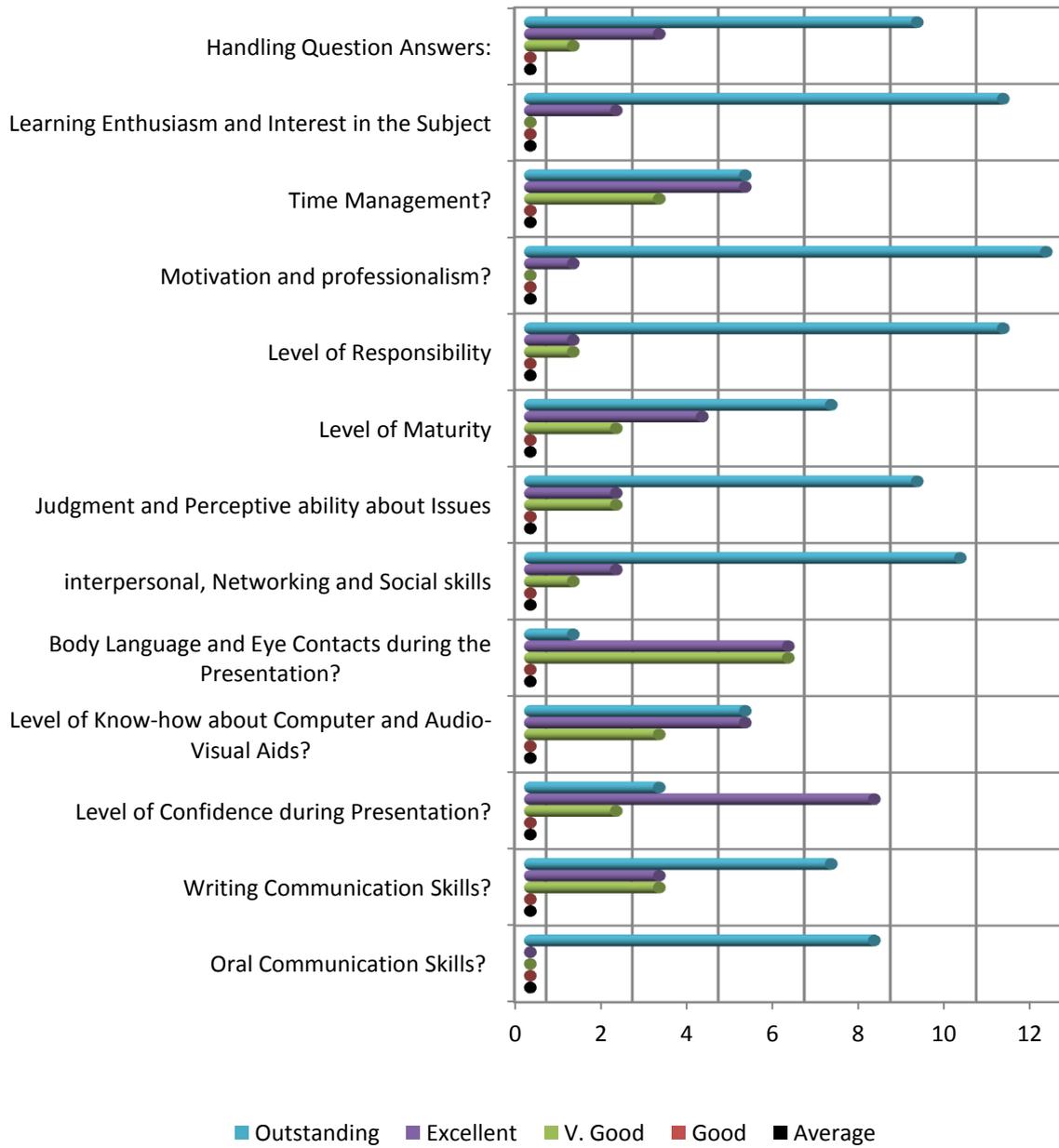








Consolidated Resource Person Evaluation by Trainees



Resource Persons:

i. Qazi Ataullah

ii. Barrister Isfandyar Ali Khan

Annexure

Annexure - A

DG welcome speech

Last two years were of great learning and I learned this one special thing i.e. if you want to build the institutions, create challenges for yourself and then try to meet them. And once you are able to meet the challenge; you feel like conquerors and you get encouraged and, then, you are ready for another challenge. I remember in February, 2012, when we were developing curriculum for judgment writing, we had to depend on many people, we had to visit different institutions, and we had to hold meetings with educationists, legal experts, judicial officers and many people. We had to have recourse to IM Sciences while preparing TNAs, the curriculum for court & case management and other similar trainings. And it was the biggest challenge for us; particularly the judicial officers who have a very little experience on education or teaching or training side. So we created challenge for us that let us try and we should prepare our own curriculums without any foreign help. This was a challenge for us and we prepared more than 10 curriculums including one for political administration of FATA. The other challenge for us was the TOT/Training of the Trainers. We had to again depend on specialists and IM Sciences. Three TOTs were conducted by the IM Sciences. So I am happy that we are meeting another challenge that after preparing the curriculums, we are conducting a TOT. You people are lucky ones that you have been selected. The selection criterion was that those people should be selected who have interest in their profession. Secondly the people who are interested in SULAH i.e. Mediation. And thirdly, who have got temperament of Mediation/SULAH. So we requested Hon'ble the High Court and they selected you people for the current TOT. Your job now is that you try to learn here and pass that to others.

Ladies & Gentlemen! Sulah is a precondition for rahm/mercy by ALLAH. The curse like situation which our society is facing nowadays is mainly because we have totally ignored the element of Sulah in our day to day dealings. The result is that we are in a crisis and trouble and even our children are not safe.

Ladies & Gentlemen I beg leave now. I welcome you to this Academy and I hope that you will enjoy your three days stay here and will learn many useful things.

Thank you.

Annexure- B

List of Participants

Sno	Name	Designation
01	Mr. Aftab Afridi	Additional District & Sessions Judge
02	Mr. Muhammad Shoaib	Additional District & Sessions Judge
03	Mr. Ajmal Wazir	Additional District & Sessions Judge
04	Ms. Kalsoom Azam	Additional District & Sessions Judge
05	Ms. Phool Bibi	Additional District & Sessions Judge
06	Mr. Ihsan Ullah Khan Mehsud	Director Administration , KPJA
07	Ms. Sofia Waqar Khattak	Director Instructions, KPJA
08	Ms. Javeria Sartaj Khan	Director Instructions –II, KPJA
09	Mr. Asghar Ali Salarzai	Incharge Mediation Center, KPJA
10	Mr. Zia ul Hassan	Assistant Researcher, KPJA
11	Mr. Muhammad Hanif Kamal	Advocate
12	Ms. Ambreen	Advocate
13	Mr. Ali Zaman	Advocate

Annexure - B

Schedule of Activities

Day :1	Topic	Resource Person	Duration
	Registration & Pre Training Evaluation		8:30 – 9:10
	Inauguration		9:15 – 9:30
	Introduction to ADR - I	Qazi Ataullah	9:30 – 11:00
	Tea Break 11:00-11:30		
	Introduction to ADR - II	Qazi Ataullah	11:30- 1:00
	Prayer & Lunch Break 1:00 - 02:00		
	Questions & Answers Recap	Qazi Ataullah	2:00 – 3:30
Day -2: Tuesday			
	Topic	Resource Person	Duration
2.1	Recitation from the Holy Qur'an & Duaa		9:00 – 9:05
2.2	Mediation Skills	Barrister Asfandyar	9:05 - 11:00
Tea Break 11:00-11:30			
2.3	Mediation in Practice	Barrister Asfandyar	11:30- 1:00
Prayer & Lunch Break 1:00 - 02:00			
2.4	Questions & Answers Recap	Barrister Asfandyar	2:00 – 3:30
Day : 3	Topic		Duration
	Recitation from the Holy Qur'an & Duaa		9:00 – 9:05
	Role Play – I	Participants Group A	9:05 – 10:00
	Role Play – II	Participants Group B	10:00 - 11:00
	Post Training Evaluation		11:00 – 11:30
	Certificate Distribution Ceremony	11:30 – 12:30	
	██████████		

Annexure – K

Group Photo

