

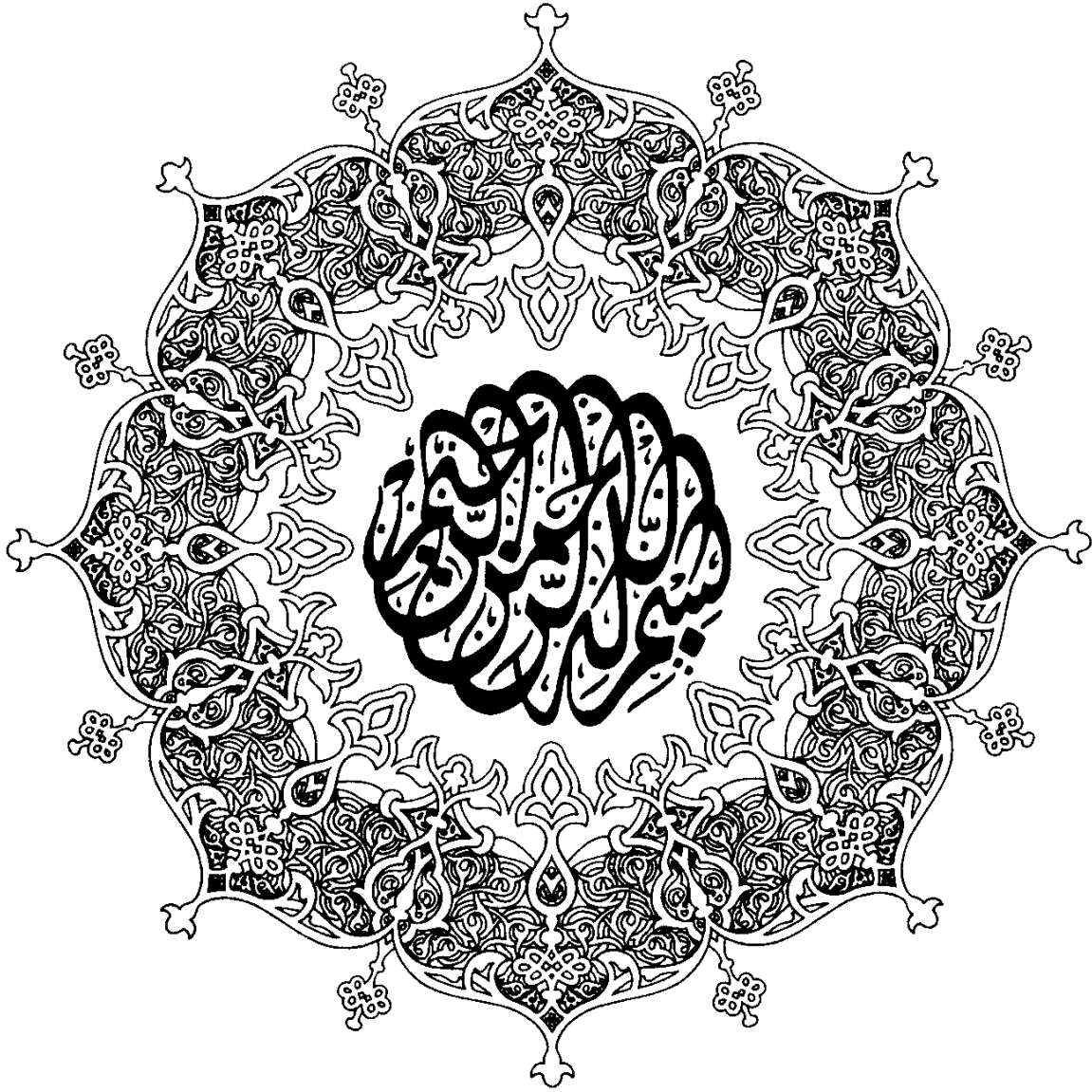


20- 22 March 2014

Report on Second Training Program on “Mediation Skills”- Judges

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

is not correct. People with problems like people with pains, relief

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

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.

Synopses

ADR (Alternative Dispute Resolution)

By Sofia Waqar Khattak⁴

ADR: Introduction

- The word “alternative” means “different”, “instead of”, “replacement”, and “on the other hand”. It also means when someone has an option between two things or when a second choice is offered while the first one is also available. So it is a privilege of choosing of one of the two things. This would enable us to hold that ADR is an alternative to regular judicial system and would disallow us maintaining that ADR is an alternate for judicial system. The reason is that despite of the universal recognition of ADR, it cannot be a substitute for the judicature. ADR and judicature each have its own significance; both are indispensable and complementary to each other.

- Section 89-A Civil Procedure Code (CPC), 1908 Provides

*“The court may, where it considers it necessary, have regard to the fact and circumstances of the case, with object of securing the expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties **Alternate** Dispute Resolution method including mediation and conciliation”.*

- CPC, Order X, 1(a) (iii), Provides

*“The Court may adopt, with the consent of the parties, any **alternative** method of dispute resolution, including mediation, conciliation or any such other means”.*

- Our study would provide the definition of the basic concept of ADR, its components and evolution as well as the concept of ADR under Islamic Law.

Dispute

⁴ Director Instructions, KP Judicial Academy

- “Dispute, when used as a noun, means “conflict” “contest” “debate” “controversy” “quarrel” “difference of opinion” “subject of litigation” and disagreement between two persons, states and nations.
- The term as a verb means “to put something into question” or “to challenge the validity of something
- In Arabic, the corresponding words for dispute are “*niza*” “*khusumah*” “*khilaf*” “*munaqasha*” “*mushakasih*” “*judal*” and “*sira*”
- Dispute denotes a situation where opposite interests constitute a conflict. It is the point from where the differences between opponents originate. The reason is that that the disputed fact is differently viewed and is oppositely believed. In civil law, the parties are considered to be at “*variance*” when one of them asserts the existence of a fact and the other denies it. This assertion and denial constitutes an issue: the name given to dispute by Civil Procedure
- Worthy to mention here is that that the dispute must be of civil nature; for example disputes pertaining to ownership, property, tenancy, business, matrimonial issues and the like. Criminal disputes cannot be referred to arbitration particularly cases of non-compoundable nature

Resolution

- Cases falling within the meaning of sec. 145 CrPC [disputes as to possession of immovable property, can be referred to arbitration due to their civil origin
- Its loose application would also convey the sense of adjudication which may be either formal or alternative. The resolution can be achieved by the disputants themselves or by any neutral person like judge, arbitrator, conciliator and mediator.
- In law, resolution means the official expression of opinion or will of legislative body. The conclusion of findings is also known as resolution. The contents of resolution are considered as a kind of soft law
- In Arabic language the word resolution, in the context of ADR, will correspond to “*fasl*” or “*hasm*”
- Resolution must be acceptable to both sides but this is not necessary in case of formal adjudication.

Though the ADR is alternative to regular civil court, it, nonetheless, cannot be considered a substitute for state regular judicial system for the reasons that;

- Firstly, causes related to public policy cannot be disposed of through ADR,

- Secondly, criminal cases particularly *hudud* and cases of non-compoundable nature are out of the ambit of ADR.
- Thirdly, issues of parties with very different negotiating powers are not suitable for resolution through ADR.
- Fourthly and lastly, ADR can be utilized best when judicial system of a state is functioning affectively. If judicial system is ineffective, neither of the parties would worry about any adverse judgment, and consequently they would have little incentive to compromise and less interest to resolve a pending dispute by any other amicable mode. So apprehension of an adverse judicial decision, fears of sharp hearings, and heavy expenses of litigation necessitate resort to ADR.

ADR as a Concept

- It provides that ADR is a generic collective phrase, encompassing various procedures. Its objective is permanent, meaningful and peaceful settlement of a dispute, through non-judicial forums, person and institution. The word “amicable” would not exclude arbitration because, in case of arbitration, amicability refers to the agreement and choice of the parties in appointment of orbiter, and to the acceptance of his award. It covers the resolution of disputes with the intervention of third party and without such intervention, and as such encloses “negotiation” ADR means working out of quicker, cheaper and highly effective ways for permanent and final resolution of national, regional and international disputes leaving aside the expensive, uncertain and cumbersome litigation that prefer technicalities over realities, fairness over justness and where keynote is law rather than justice.

ADR Under Islamic Law

Commands regarding amicable settlements could be found in the Holy Quran and Sunnah in numerous places. To be more specific, *Sulh*, its cognates and collocations can be found in more than 175 verses of the Holy Quran. Most of the jurists of Islamic Law have specified independent chapters in their voluminous books for *sulh*. Famous Facts of Madina and Hudaibia were also the outcomes of negotiations. In the Charter of Medina; the first ever written constitution of the world, the Prophet Muhammad (SWA) was unanimously admitted as final forum of arbitration. Besides, during the reconstruction of *Kaaba*, dispute arose between the leaders of local tribes of Makkah on the point that who would have the honour to reinstall the sacred black stone (*al-Hajr al-Aswad*). just before a battle was likely to happen, Muhammad (SAW) was requested to arbitrate. The Prophet explored a

wonderful phenomenon by keeping the stone in a small piece of cloth. He, then, directed the chief of every clan to hold the cloth from specified area and to left it to him. When they did so, the Prophet (SAW) himself placed the stone. The dispute was, thus, settled peacefully.

- If the *qadi* apprehends the adjudication will worsen the situation and will amount to bloodshed between the disputants, recourse to ADR becomes imperative.
- In so many occasions, the Quran has invited the non-believers, particularly the Jews and Christians to negotiations. Some of the relevant verses and hadiths are listed below.

“Have fear of Allah and resolve your differences”. (Surah al-Anfal, 8:1)

And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly. (Surah al-Hujrat, 49:9)

The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy. (Surah al-Hujrat, 49:10)

ADR: Need and Justification

Litigation is reaction which deepens the differences whereas ADR is a response which uproots the dispute. The former promotes resistivity and the later encourages adjustment. There can be no life without adjustment rather “adjustment itself is life”

Fixation of liability and establishing the fault and guilt is not necessary in each and every case. Approximately, 90 per cent cases fall within category which need not regular adjudication. Such cases remain subjudice for irrational and cumbersome length of time, destroying the wealth and time of the parties. The precious time of the court is wasted and the national exchequer is burdened with useless expenditure.

Mediation Skills

By Barrister Isfandyar Ali Khan⁵

After the ToT Program, a Roll Out Training Course in Mediation Skills was launched for Judges. The overall objective was to sensitize and build capacity of junior judges in mediation skills. The training course was an opportunity for judges to appreciate ADR processes in light of the recently set up Dost Mohammad Khan Mediation Centre and use skills essential for mediating successfully.

Following subjects were delivered during the Roll Out Training Course (Judges) in Mediation Skills sessions:

1. Comparison of ADR mechanisms (Litigation, Arbitration, Negotiation and Mediation)
2. Mediation Skills: Definition, Phases of Mediation, Settlement Agreements
3. Mediation Process: Case Referrals, ADR/mediation clauses and Enforceability mechanisms.
4. National Judicial Policy, PHC Judicial Esta Code, ADR Laws, ADR Law Reforms and Institutions for ADR.

The participating judges benefitted from interactive sessions on ADR and its various forms and skills used in facilitating disputing parties to reach amicable settlement. The resource person highlighted the fact that judges do try to serve as conciliator between spouses in family disputes and provide them opportunity for reaching settlement however understanding of skills is important for dealing with challenging issues. Court-Annexed Mediation and Judicial Mediation concepts were shared with participating judges. Code of ethics in mediation process was also highlighted as part of skills training.

⁵ *CEDR Accredited Mediator and Master Trainer*

Role of Mediator

By Ms. Phool Bibi⁶

Introduction

Conflict of interest is a primary factor for any dispute. It is the nature of resolution of a dispute that differentiates a civil society from that of a barbaric one; mediation is a process which is practiced in the former for resolution of a dispute. The activity of mediation is not a new concept; it has appeared since ancient times. Being a part and parcel of ADR (Alternative Dispute Resolution), mediation is less time consuming and cost effective. The effectiveness of mediation process in a dispute resolution principally depends on the role of a mediator.

Methodology

Since many of the participants will be neophyte to the concept, a beginner course will be emphasized i.e. what is mediation, why mediation? process of mediation, role of mediator etc. The lecture will be divided into three phases. In the first phase a traditional mode of communication will be adopted i.e. the trainer will explain each of the aspects of mediation and role of mediator. In the second phase a two way communication (Q&A) will be established between the trainer and the trainees, to clarify the subject. In the last phase, the participants will be given a role play in different *scenario* to further polish their mediation skills & techniques.

Learning outcomes.

At the end of the session

- i. The participants may be able to have a fair/ advance knowledge on mediation skills.
- ii. The participants may be able to have a better understanding on the role of mediators.
- iii. The participants may be able to polish their mediation skills to become effective mediators.

Expected Shortcomings:

- i. Since the session will be brief, the objective of the topic may not be achieved i.e. from beginner to advance knowledge on the role of mediators

Reading Material.

ADR Manual developed by KPJA.

⁶ *Additional District & Sessions Judge, Peshawar.*

Arbitration

By Ms. Kalsoom Azam⁷

Introduction

Arbitration has been an effective tool in the resolving disputes outside the courts both internationally and locally. In the modern state system, Great Britain and USA had perfected the art of arbitration. The Jay Treaty of 1795 was the milestone in the annals of arbitration which effectively settled the Alabama dispute between USA and UK. Arbitration as such has a localized ingredient too. As an effective tool of ADR, arbitration can be used to settle dispute outside the ambits of court, to avoid a lengthy and time consuming process for resolving a dispute in a court.

The Pakistani judicial system has been over burdened with the influx of cases, and due to limited resources, majority of the cases end up in a delayed and morbid state. The use of Arbitration by the parties involved can effectively address the already workload on the judiciary.

Methodology

In this session, the meaning of arbitration along its brief history will be discussed. Q&A session will be exercised, to clarify the subject in any topic of the lecture. Since the core objective of this training is to develop the arbitration skills of the trainees, a practical approach will be adopted i.e. role play.

Learning Outcomes

At the end of the session

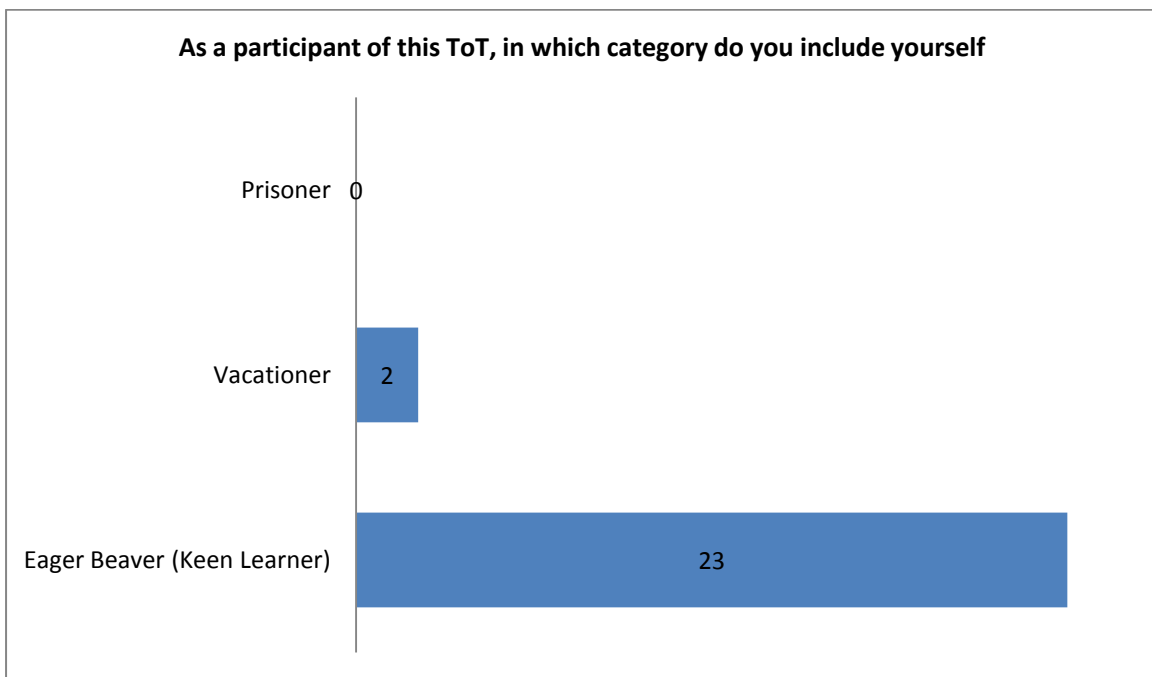
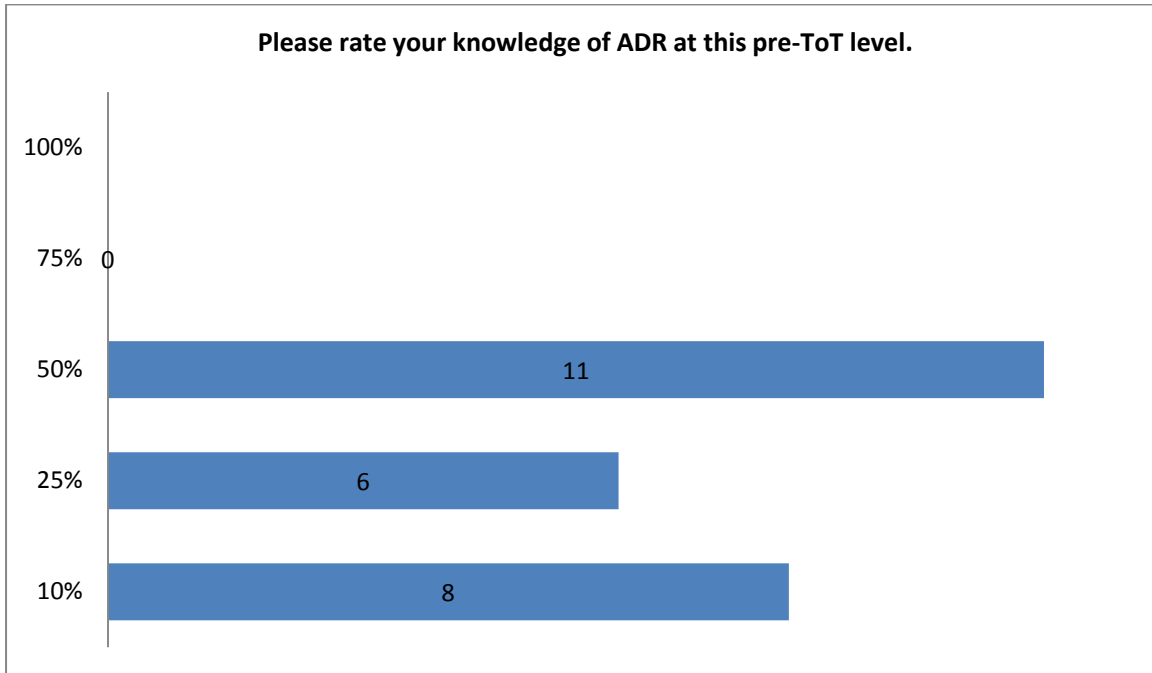
- The participants may be able to develop a fair knowledge of arbitration.
- The participants may be able to practical apply their skills gained in the field.

⁷ District & Sessions Judge Peshawar.

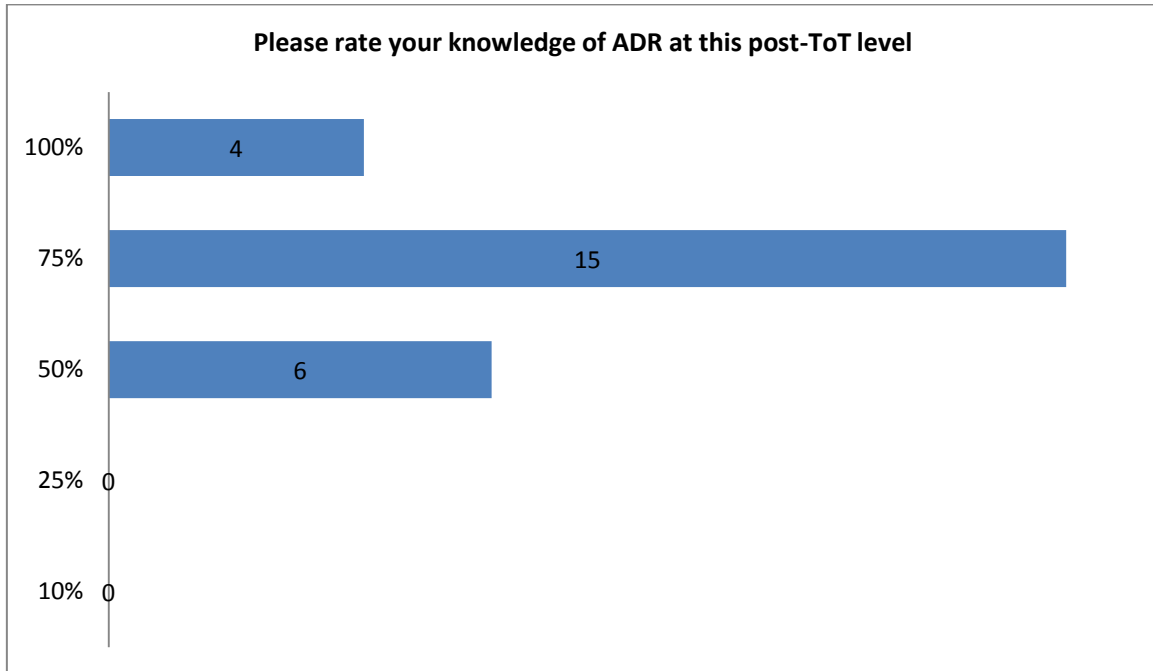
Reading Material

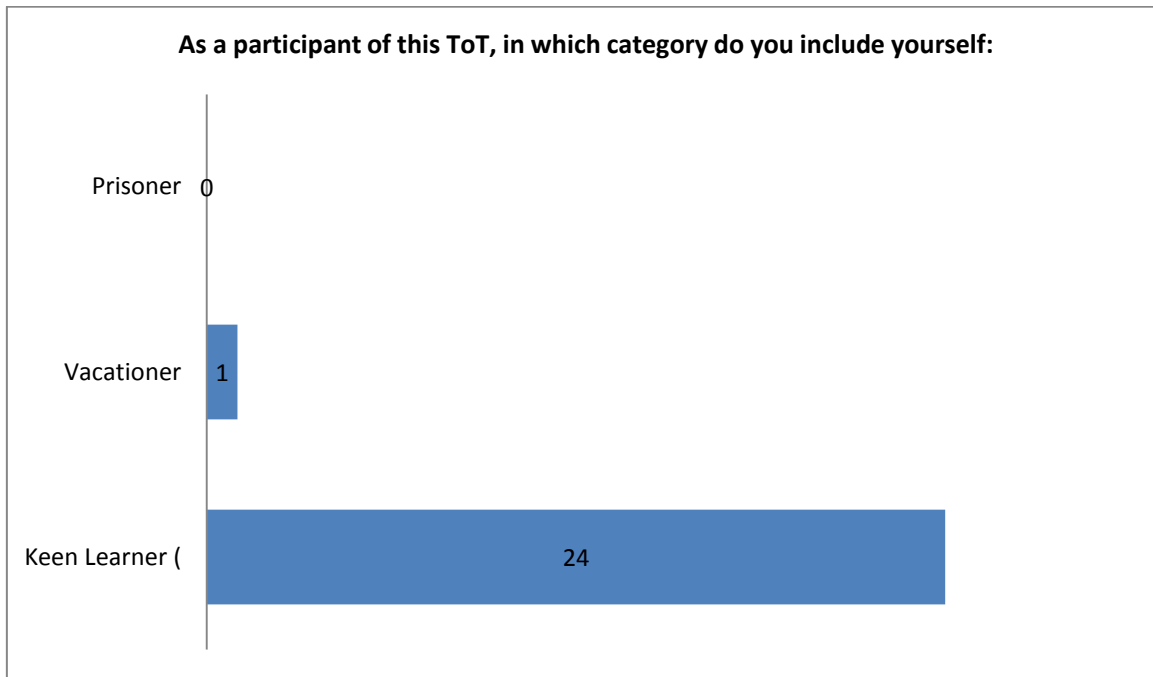
- ADR Manual developed by KPJA.

Pre Training Evaluation



Post Training Evaluation





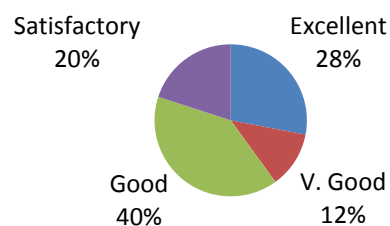
Comparative Statistical Statement of Pre & Post Training Evaluation

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?

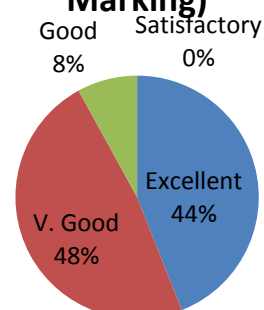
Pre Evaluation

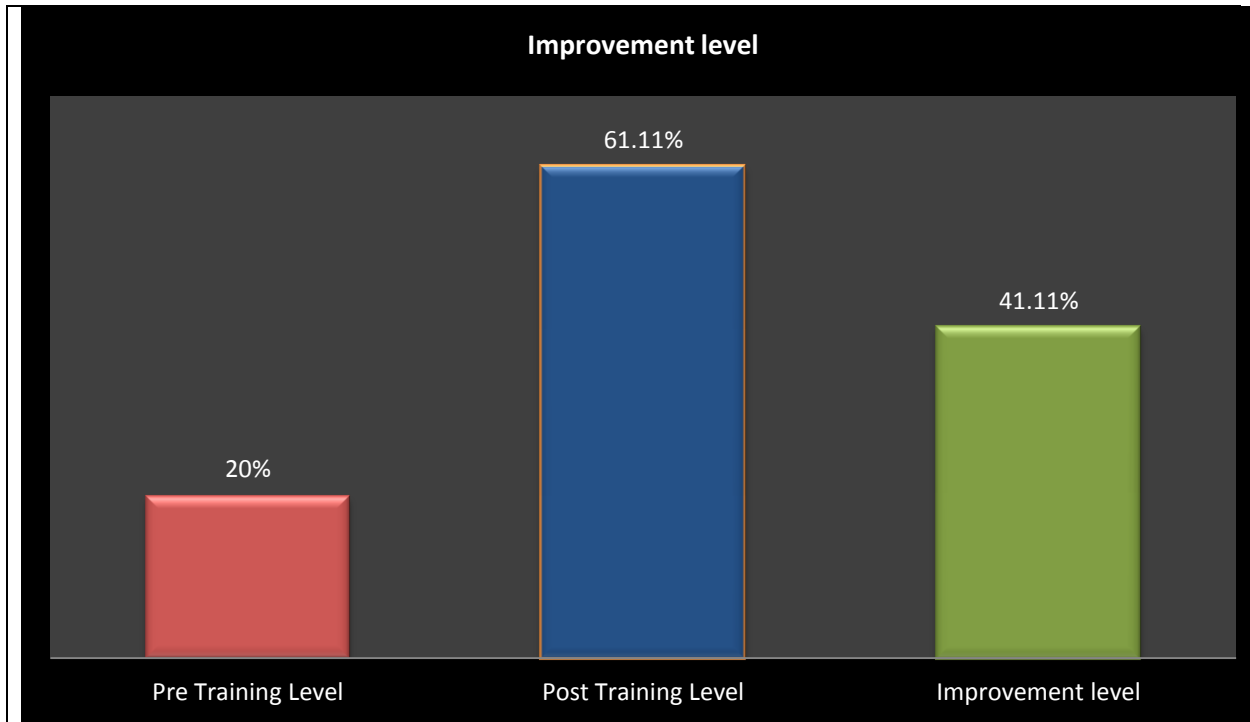
Pre Evaluation (Open Ended Questions Marking)



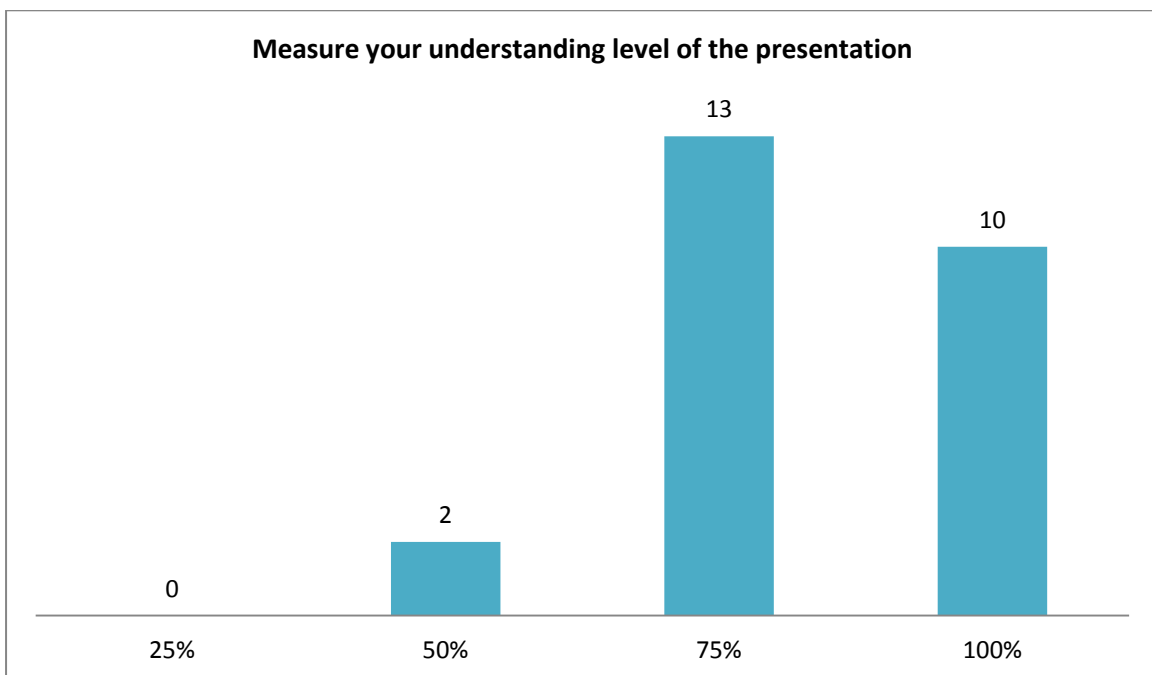
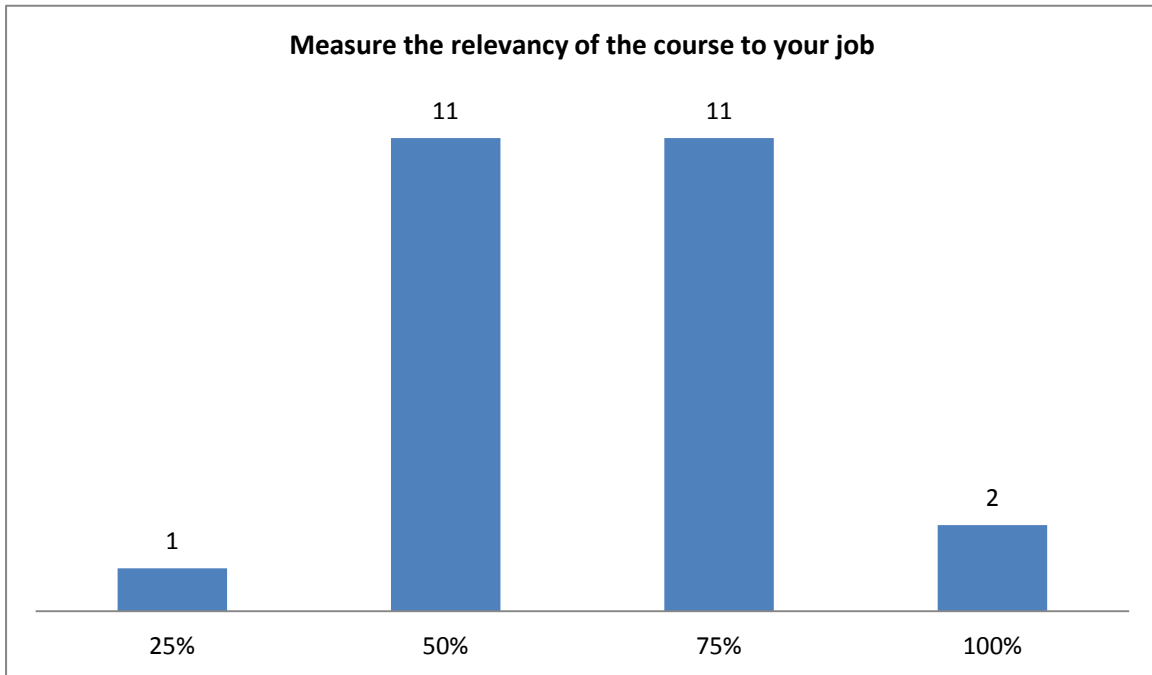
Post Evaluation

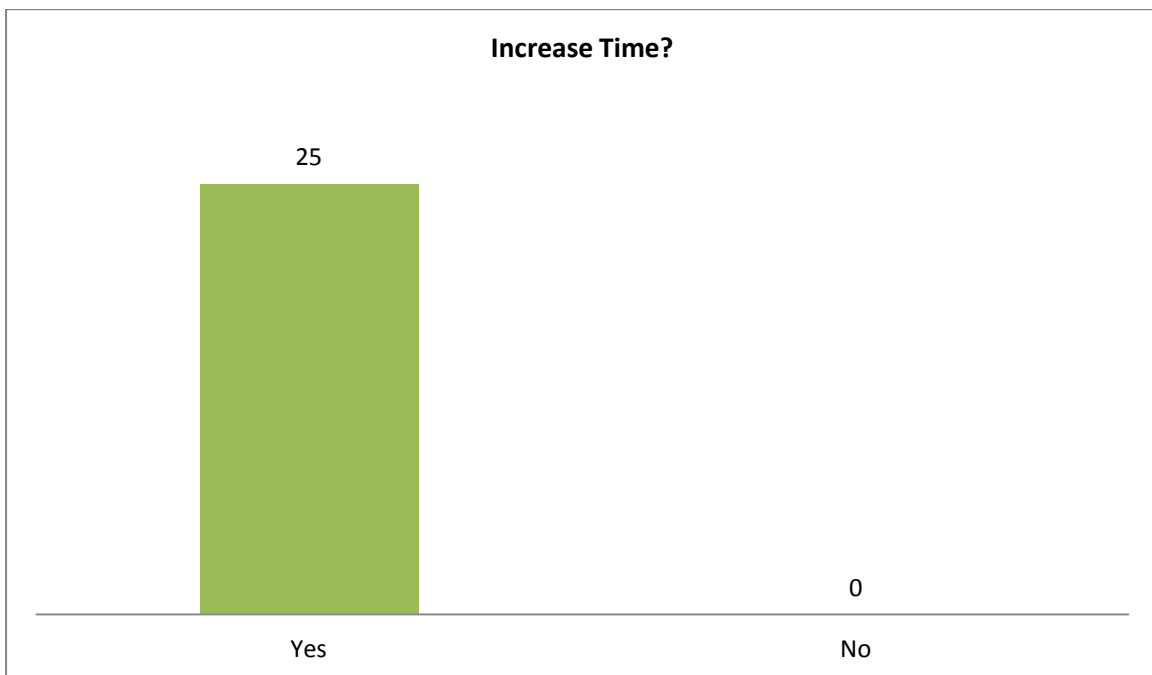
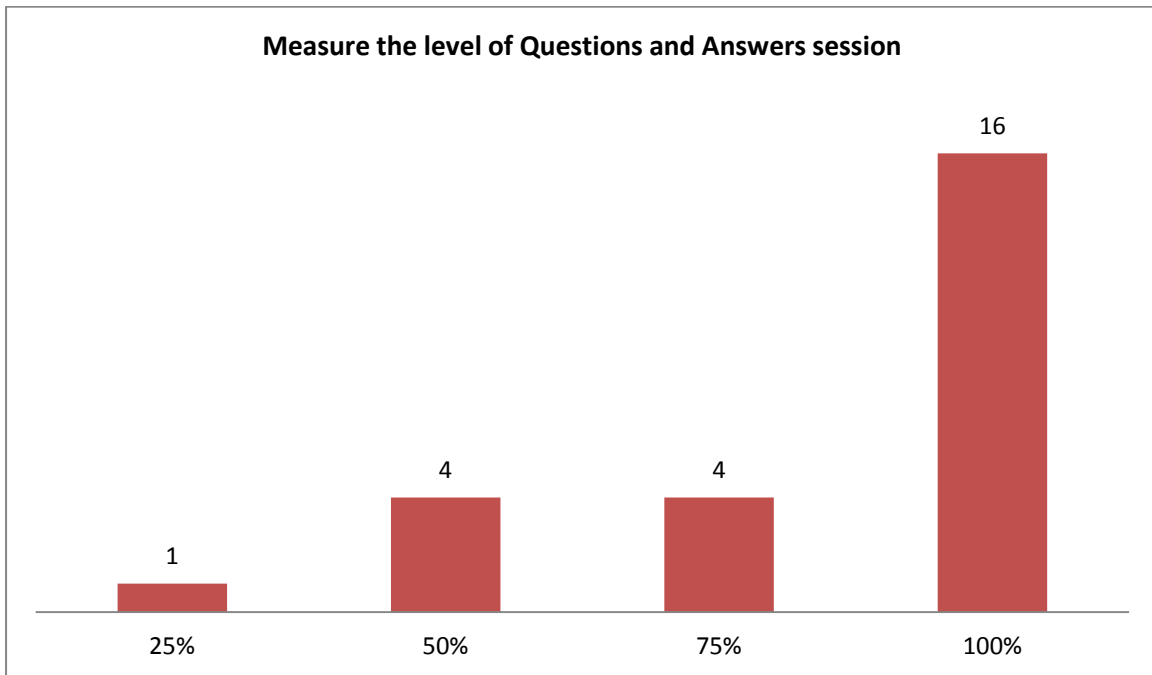
Post Evaluation (Open Ended Questions Marking)

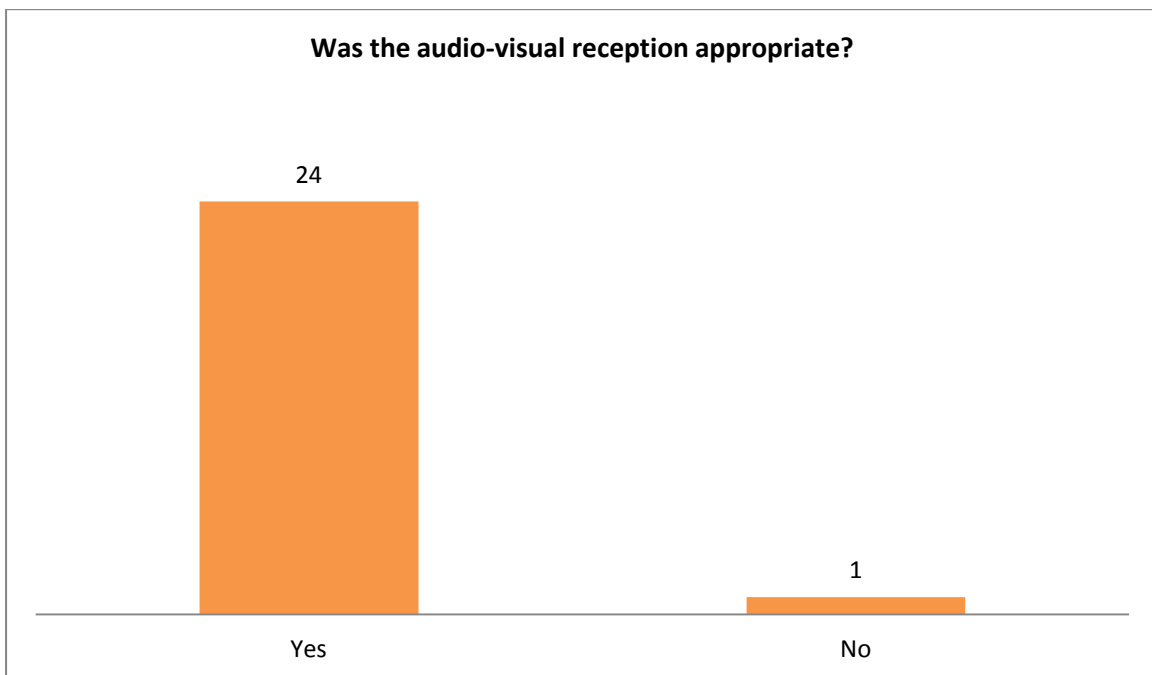
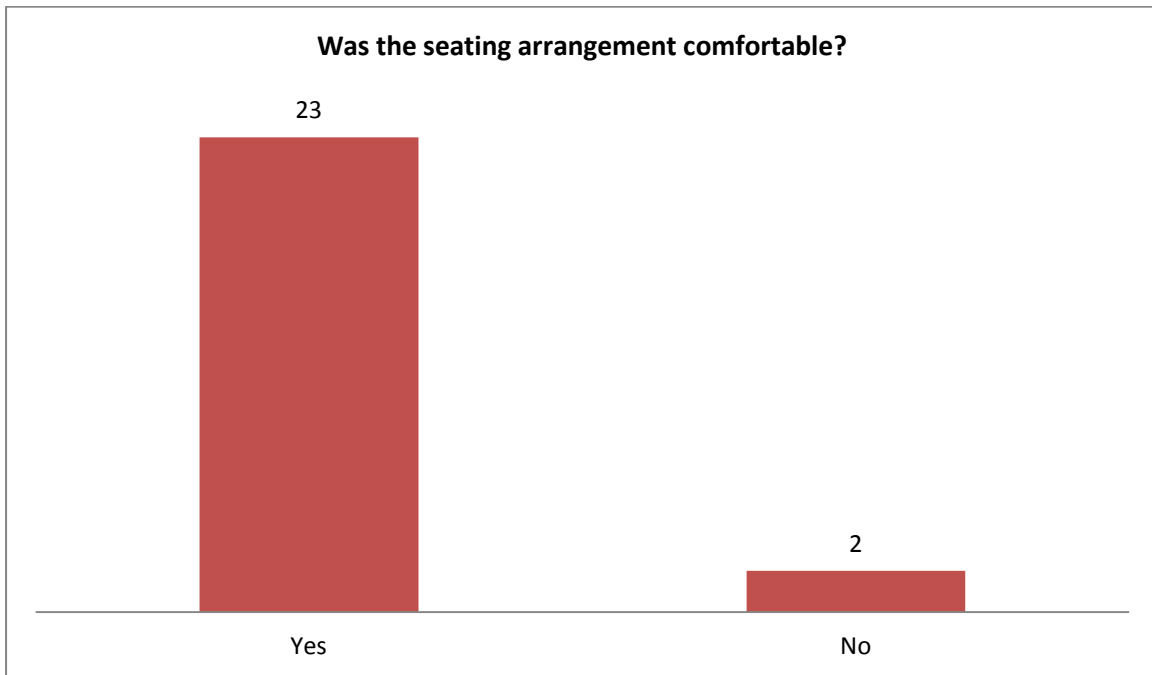


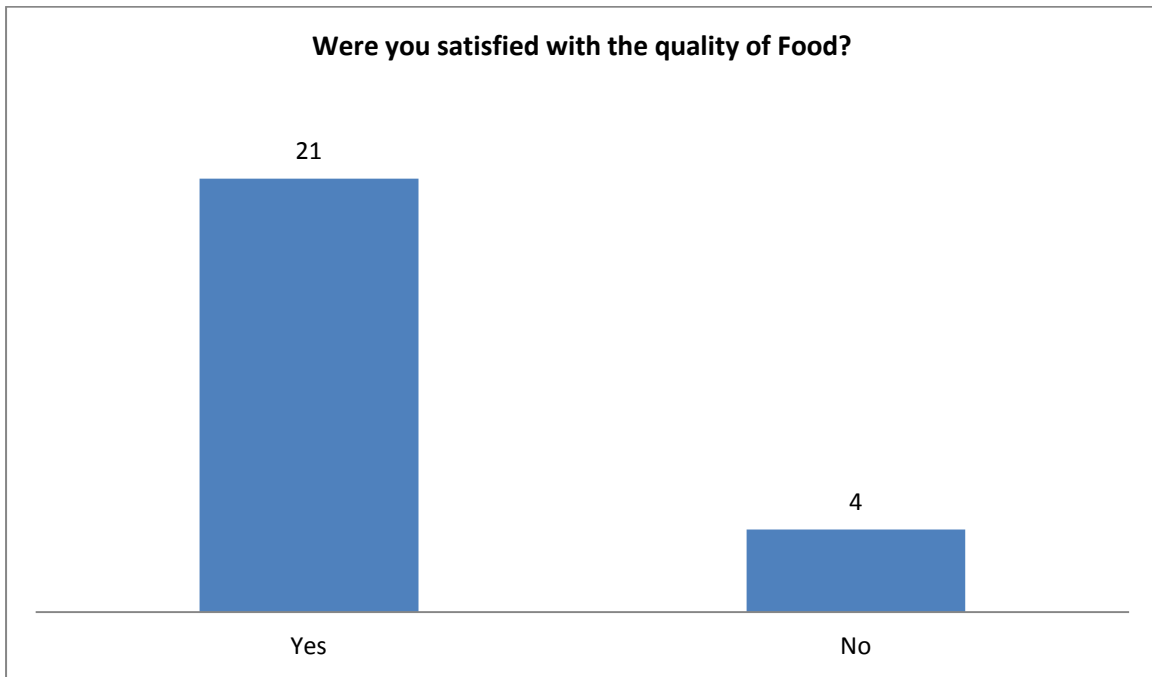


Over – All Training Evaluation

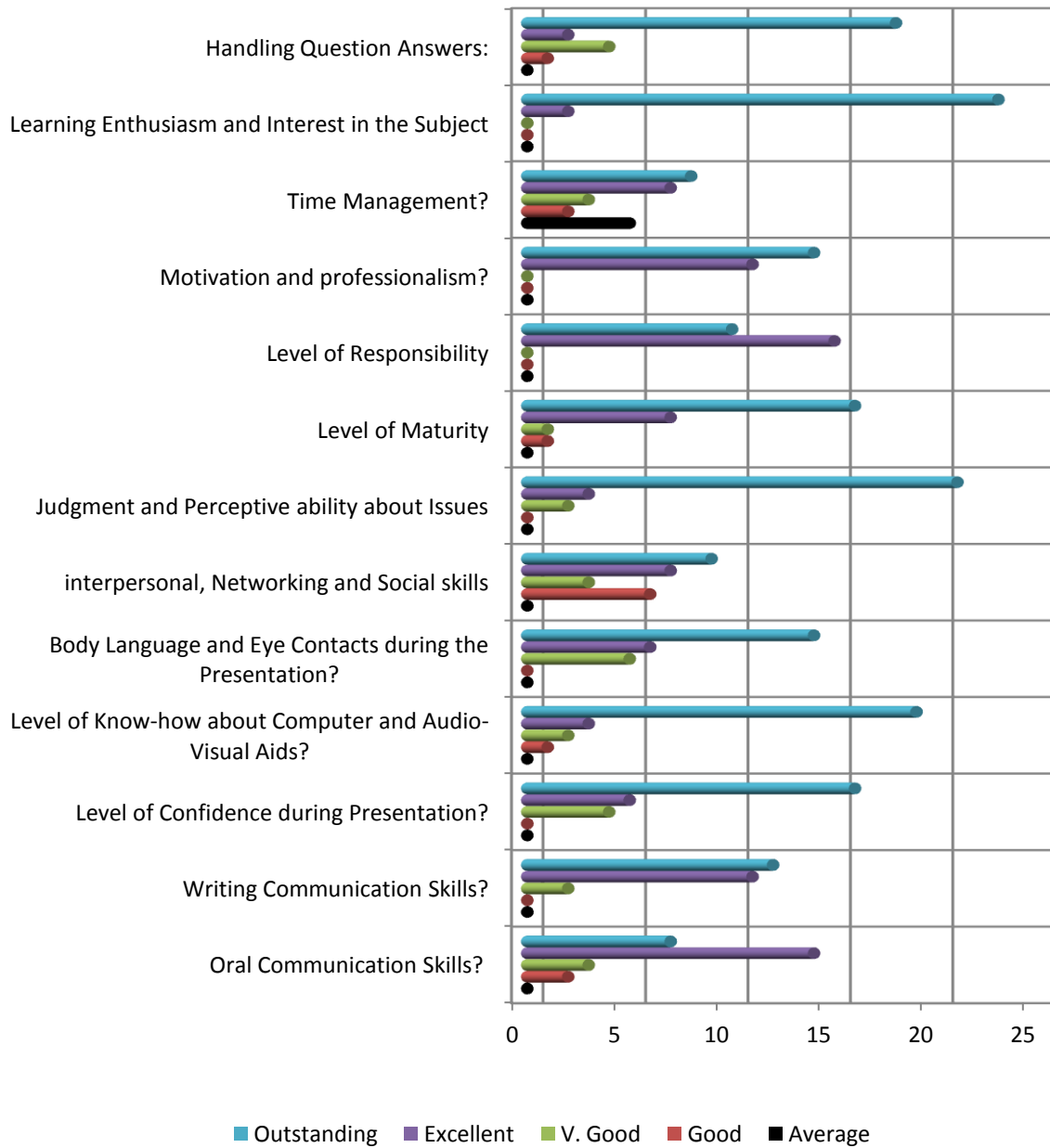








Consolidated Resource Person Evaluation by Trainees



Resource Persons:

i. *Qazi Ataullah*

ii. *Barrister Isfandyar Ali Khan*

iii. *Ms. Kalsoom Azam*

iv. *Ms. Phool Bibi*

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
1.	<i>Ms. Farzina Shaid</i>	<i>Civil Judge/JM</i>
2.	<i>Ms. Zeba Rasheed</i>	<i>Civil Judge/JM</i>
3.	<i>Ms. Saadia Andaleeb</i>	<i>Civil Judge/JM</i>
4.	<i>Ms. Nusrat Naz</i>	<i>Civil Judge/JM</i>
5.	<i>Ms. Wadeeya Mushtaq Malik</i>	<i>Civil Judge/JM</i>
6.	<i>Ms. Hina Mehwish</i>	<i>Civil Judge/JM</i>
7.	<i>Ms. Sanam Taj</i>	<i>Civil Judge/JM</i>
8.	<i>Ms. Mah Jabeen</i>	<i>Civil Judge/JM</i>
9.	<i>Ms. Tania Hashmi</i>	<i>Civil Judge/JM</i>
10.	<i>Ms. Faiza Gul</i>	<i>Civil Judge/JM</i>
11.	<i>Ms. Rabia Abbasi</i>	<i>Civil Judge/JM</i>
12.	<i>Ms. Nazia Hassan</i>	<i>Civil Judge/JM</i>
13.	<i>Ms. Saeeda Akhtar</i>	<i>Civil Judge/JM</i>
14.	<i>Ms. Syeda Tehreema Sahahat</i>	<i>Civil Judge/JM</i>
15.	<i>Mr. Muhammad Fiaz</i>	<i>Civil Judge/JM</i>
16.	<i>Mr. Muhammad Wali</i>	<i>Civil Judge/JM</i>
17.	<i>Mr. Zia Jehangir</i>	<i>Civil Judge/JM</i>
18.	<i>Mr. Issa Khan Afridi</i>	<i>Civil Judge/JM</i>

19.	<i>Mr. Ijaz Ul Haq Awan</i>	<i>Civil Judge/JM</i>
20.	<i>Mr. Fahad Ahmad</i>	<i>Civil Judge/JM</i>
21.	<i>Mr. Abdul Hassan Mohmand</i>	<i>Civil Judge/JM</i>
22.	<i>Mr. Muhammad Zahoor</i>	<i>Civil Judge/JM</i>
23.	<i>Mr. Mohsin Abbas</i>	<i>Civil Judge/JM</i>
24.	<i>Mr. Sher Aziz</i>	<i>Civil Judge/JM</i>
25.	<i>Mr. Ishfaq Ahmad</i>	<i>Civil Judge/JM</i>

Annexure – C

Schedule of Activities

Day -1			
No	Topic	Resource Person	Duration
Session 1			
	Registration & Pre Evaluation		8:30 – 9:30
	Recitation from the Holy Qur'an & Duaa		9:30 – 9:35
	Introductory Remarks - DG, KPJA		9:35 – 9:45
Session 2			
	Introduction to ADR	Sofia Waqar	9:45 – 11:15
Tea Break 11:15 – 11:30			
Session 2 Continues			
	ADR under Islam	Qazi Ata Ullah	11:30- 1:00
Lunch & Prayer Break 1:00-01:45			
Session 3			
	Arbitration in Family Laws	Qazi Ata Ullah	1:45 – 3:45
Day -2			
No	Topic	Resource Person	Duration
Session 1			
	Recitation from the Holy Qur'an & Duaa		9:00 – 9:05
Session 2			
	Mediation-I	Br. Isfandyar Ali Khan	9:05-10:45
Tea Break 10:45-11:30			
Session 2 Continues			
	Mediation- II	Br. Isfandyar Ali Khan	11:30- 1:00
Lunch & Prayer Break 1:00-01:45			
Session 3			
	ADR in Pakistani Legal System	Muhammad Shoaib	1:45 – 2:45

Annexure – K

Group Photo



KHYBER PAKHTUNKHWA JUDICIAL ACADEMY
Training Course on “Mediation Skills” 20-22-March, 2014



