Psychological Tests for Assessing Competency to Stand Trial : A Literature Review.

By :

Ashmita Dey[1]

Student of Rabindrik Psychotherapy Research Institute Trust, Kolkata.

&

Debdulal Dutta Roy[2]

Psychology Research Unit, Indian Statistical Unit, Kolkata.

ABSTRACT

Background : The American Board of Forensic Psychology describes this field as the application of psychology to issues that involve the law and legal system. Forensic Psychology is a relatively a new speciality area and thus has a several pertinent issues. One such is competency to stand trial. Competency to stand trial refers to the defendant's ability to rationalise with his lawyers and assesses his ability to logically understand the proceedings against him. The psycho-legal concept bears significance because it reflects onto the dignity of the process, while at the same time it upholds the fairness for the defendant.

Objective : The objective of this study is to examine psychological tools used for assessing different competency levels of the offender in the legal decision.

Method : After following review of the prior studies, it appears that nine psychological test are widely used. The tests are Competency Assessment Instrument (R = 0.84), Competency Screening Test (R = 0.93), MacArthur Competency Assessment Tool – Criminal Adjudication (R = 0.85), Georgia Court Competency Test (R = 0.95), Minnesota Multiphasic Personality Inventory (R = 0.80), The Interdisciplinary Fitness Interview (R= 0.93), Evaluation of Competency to Stand Trial – Revised (R = 0.97), Inventory of Legal Knowledge (R = 0.76)) and The Fitness Interview Test (R = 0.98).

Results : It appears that the existing Forensic Assessment Instruments (FAIs) and Forensically Relevant Instruments (FRIs) are not suited for the Indian population. The required universal

1. Student of Rabindrik Psychotherapy Institute Trust and an intern, working under the guidance of Dr. Dutta Roy at Psychology Research Unit, Indian Statistical Institute, Kolkata. Ms Dey has specific interest in the Forensic Psychology and its various faucets.
2. Head and Associate Professor of the Psychology Research Unit, Indian Statistical Institute, and founder of Rabindrik Psychotherapy Research Institute Trust, Kolkata, India. Dr. Dutta Roy has specific interest in measurement of Environmental Psychology and Forensic Psychology.

domains for the effective development of such culturally responsive psychological tools have also been shortlisted from the analysis of the existing ones.

Discussion : The psychometric properties and their applications as well limitations have been discussed in this study with respect to the Criminal Justice Theory. Findings will be useful in facilitating the speed of the legal process and can thus, reduce the pendency rates in a judiciary system and finally improve the quality of life of the offender.

Keywords : Competency to Stand Trial, Forensic Psychology, Criminal Justice Theory, Forensically Relevant Instruments.

CHAPTER I : WHAT IS COMPETENCY TO STAND TRIAL?

Competency to stand trial has emerged as one of the most prominent issues of the field of forensic psychology (K.D DeFreitas et al, 2015). Competence refers to the ability to do a task successful and efficiently. A competent individual would be able to rationally think, make decisions and execute the task at hand. As Roesch has stated "Competency to stand trial is a concept of jurisprudence allowing the postponement of criminal proceedings for those defendants who are unable to participate in their defence on account of mental disease or intellectual disability. Because trial competency issues are raised substantially more often than the insanity defence, psychologists involved in forensic assessment and consultation are likely to have more experience with competency evaluations than those of criminal responsibility" (Roesch et al, 1999)

The modern standard in the United States was established in Dusky v. United States (1960). Dusky vs United States was landmark United States Supreme Court case in which the defendant's right to have a thorough competency assessment before the legal proceedings commenced, was sanctioned, and upheld by the Court of Law. Milton Dusky, aged 33 years was charged with assisting in the rape and kidnapping of an underaged girl. Although he was suffering from schizophrenia, he was found to be competent to stand trial and received a sentence of 45 years. A petition of writ of certiorari through which the defendant's lawyer sought a review of the judicial decision was submitted and hence requested for the conviction to be reversed on the grounds that the defendant was not capable to stand trial and thus, could not continue with the legal proceeding. The writ of certiorari was granted upon reviewing the evidence and the case was remanded for trial, during which the sentence was reduced to 20 years.

Although the language might vary, all states use a variation of the Dusky standard to define and refer to competency (Favole, 1983). In Dusky, the Supreme Court held:

"It is not enough for the district judge to find that "the defendant is oriented to time and place and has some recollection of events," but that the test must be whether he has ***sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding****—and* ***whether he has a rational as well as factual understanding of the proceedings against him."*** (Roesch et al, 1999)

Thus, to study competency to stand trial, we must first differentiate between individuals who are competent to stand trial and those who are not. Historically, psychosis has been equated with incompetency by evaluators (McGarry, 1965; Roesch & Golding, 1980). Rarely psychological tests were used; even if they were employed, they were used as diagnostic tool to determine the existence of psychosis. Consequently, the same standard mental status examination was used to provide the evaluations for all. While the mental status of a defendant is important, it is not appropriate evaluation of competency. Empirical research findings over the last 35 years have impelled to challenge and improve timeworn practices. Some researchers have suggested that competence should be defined and considered within a contextual framework, within which it will be used. This contextual perspective was summarized by Golding and Roesch (1988):

"Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in this defendant, facing these charges, in light of existing evidence, anticipating the substantial effort of a particular attorney with a relationship of known characteristics, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome."

The objective of this study is to examine psychological tools used for assessing different competency levels of the offender in the legal decision and to understand their limitations. Evaluation of competency to stand trial can facilitate the legal proceedings in a steadfast manner, in turn decreasing the pendency rates and providing a quality life to all.

CHAPTER II : ASSESSING COMPETENCY –

Multiple instruments designed to assess competence have been developed over the past 50 years. McGarry and his colleagues, (McGarry, 1965) were pioneers in this field and their work paved way for a more systematic and sophisticated approach to competency evaluation. In 1986, the term Forensic Assessment Instrument (FAI) was coined by Grisso and it described instruments that provided the framework for conducting forensic assessments. FAIs are measures designed to evaluate psycho-legal abilities rather than the psychological constructs

measured by traditional psychological tests. FAIs make forensic assessments more systematic and assist evaluators in collecting important and relevant information by following the decision-making process required under the law. During the eminent amnesia case of Wilson v. United States (1968), court of appeals held that six factors should be considered in determining whether a defendant's amnesia impaired the ability to stand trial:

"1. The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
2. The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
3. The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonable possible alibi.
4. The extent to which the Government assisted the defendant and his counsel in that reconstruction.
5. The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
6. Any other facts and circumstances which would indicate whether or not the defendant had a fair trial." (Wilson v. United States, 1968, pp. 463-464)

Any symptom can be substituted for amnesia in the above quote from Wilson V United State., then the competency evaluation would be determined based on the way the defendant's incapacity might hinder the legal proceedings. Thus, both psycho-legal abilities as well as mental status examination is required to assess competency (Otto and Weiner, 2013). The following table summarizes the various psycho-legal abilities required to assess competency to stand trial, as stated by McGarry.

1. Ability to appraise the legal defences available
2. Level of unmanageable behaviour
3. Quality of relating to attorney
4. Ability to plan a legal strategy
5. Ability to appraise the roles of various courtroom participants

6. Understand of court procedure
7. Appreciation of the charges
8. Appreciation of the range and nature of possible penalties
9. Ability to appraise the likely outcome
10. Capacity to disclose pertinent facts surrounding the offense
11. Capacity to realistically challenge prosecution witnesses
12. Capacity to testify relevantly
13. Manifestation of self-serving versus self-defeating motivation

Table 1 : Psycho-legal abilities as summarized by McGarry, (adapted from McGarry, 1973) (Morris and Deyoung, 2012).

Previously, competence evaluations were based on clinical assessment tools that measured academic achievement, psychopathology, and intelligence.. However, research findings have demonstrated that appropriate psycho-legal abilities were not being addressed during these evaluations and thus a connection between the defendant's emotional or behavioural impairments and impaired psycho-legal capacities was not often drawn. (Skeem et al., 1998). Thus, several instruments have been developed, over the course of past 40 years, to assist forensic examiners assess the competence-related abilities of defendants. These tools consider all abilities related to competence and have been normed on pertinent populations such as defendants with a mental disorder or defendants who have been adjudicated incompetent to stand trial. These "Forensic Assessment Instruments" range from checklists to structured interviews. It is important to understand that even though they have been designed to assess specific psycho-legal abilities, none of these instruments can classify one as "competent" or "incompetent". These instruments simply provide information about the competence-related abilities and therefore more be integrated into a more sophisticated competence evaluation that the examiner still must conduct (Nicholson et al, 1988) Thus, this leads us to the different competency assessment methods - their scope, assessment techniques and their drawbacks.

1. **Competency Screening Test** was developed by Lipsitt et al in 1971 had 22 items based on a sample of 43 men. The test was developed to sift the competent defendants from those who deserved a thorough evaluation. Thus, the test should not be used determine that the defendant is not competent. It is also important to note, that since this is a

sentence completion test, it can be only administered to a literate defendant. It has a reliability of 0.93 and validity of 0.82. The false positive rates of CST allow to discredit the evaluation of incompetence as an error in the test. It is also important to remember that the CST does not provide descriptions of the examinee's performance. The test score only indicates if a follow test is required. Validation studies conducted using the test revealed that it can be a useful component for a comprehensive competency assessment, it cannot be the sole basis for competency decisions. (Nicholson et al, 1988).

2. **Competency Assessment Instrument**, established by Lipsitt and Lelos in 1970, again had a sample of 43 men and consisted of a total of 13 items. This widely used instrument was designed to rate the competence related abilities of the defendant as well as to provide a structure to the examiners' assessment of the same. In order to assist examiners with their probe, a compilation of the suggested questions along with their response example is also available. The instrument assesses 13 essential areas related to competence and This is an instrument, which is designed to structure examiners' assessments and ratings of defendants' competence related abilities. It has been widely used and covers 13 areas essential to trial competence. It comes with a handbook which includes specific suggested questions and response examples. its reliability and validity index is 0.84 and 0.82 respectively. However, because the CAI provides no formal scoring procedure, using the CAI scales to reach formal conclusions is not really a possibility. While validation studies have reported high levels of interrater reliability and significant correlations between competence opinions of mental health professionals and overall CAI ratings (Nicholson and Kugler, 1991), there is no standardized administration or well-defined rules for translating ratings to an overall judgement of the defendant's competence. (Stafford and Sellbom, 2013).

3. **Interdisciplinary fitness interview** consists of 20 items, was created by Golding et all in 1984. It was based on a sample of 77 individuals and is a 45-minute semi structured interview designed to be administered jointly by a mental health professional and an attorney to provide an overall, general rating of "fit" or "unfit". Different legal areas as well as the presence of psychological defects like mental retardation, hallucinations and amnesia is examined by IFI. The scores range from 0-2, the lowest score – 0 implying

no incapacity and a score of 2 is suggestive of severe incapacity. The IFI has a reliability of 0.93 and a predictive validity score of 0.83 and it is also one of the few tests that includes an attorney directly in the examination procedure This allows attorneys to collect data from the defendant on factors directly relevant to her case. However, since little research has been done on IFI, its results might be easier to challenge.

4. **Fitness interview test** was developed by Roesch, Webster and Eaves in 1984 based on a sample of 255 individuals, consisted of 38 items. Fitness Interview Test emphasizes the inquiry on 16 prominent areas that include the defendant's 1) one's understanding of the grounds of his/her arrest, the legal proceedings involved, probable penalties and prospective pleas, and 2) the rational ability to contribute in one's defence strategies and the ability to effectively communicate with the defence counsel. It had a reliability index of 0.98 and validity index of 0.89. It is imperative to acknowledge that the FIT-R can server neither a predictive or retrospective assessment function but only provide the relative competence status of the accused. In a factor analyses study, Bagby et al (1992) found that FIT legal items failed to yield a stable factor structure across samples most likely due to the uniformity in the item content. The FIT legal items appear to be one-dimensional and may not assess multiple aspects of competence. Moreover, due to the lack of concrete definitions for rating the items, generalization of ratings may occur. (Stafford and Sellbom, 2013)

5. **Georgia court competency test** (Mississippi State Hospital Revision) was undertaken in 1978 by Wildman et al had a standardized sample of 111 individuals and consisted of 17 items. The GCCT-MSH was initially designed to differentiate between defendants who were competent from those who may have needed further evaluation. The GCCT-MSH comprises of 21 questions and takes 10-15 minutes to administer. The first 7 questions ask an examinee to visually ascertain and state the position of specific actors in the court, along with their functions; what are the charges and consequences faced by the defendant. With a reliability of 0.95 and validity of 0.81, the GCCT-MSH is a simple and straightforward test to administer and is also the only test that requires the defendant to visually identify items. However, some of the questions deal with comparatively trivial issues like "who sits where" and perhaps may not be truly useful in exhibiting proper understanding of the legal processes involved. The underlying

dimensions of the GCCT-MSH have been examined more than any other interview-based competency measure. The original factor analysis, as per Grisso (1986) yielded two dimensions – "knowledge of the court" and "style of responding to legal situation". Subsequently, Nicholson et al,. (1988) established three factors that correspond closely to the Dusky prongs. Two recent studies (Rogers, Ustad, Sewell & Reinhart, 1996; Ustad et al, 1996) however have failed to establish the stable dimensions of the test. Thus, the test's dimensions are not stable enough to be applied to incompetent and disordered population. (R. Rogers et al, 2001)

6. **Evaluation of Competency to Stand Trial – Revised** was developed by Rogers, Tillbrook and Sewell in 2004. It was based on a standardized sample of 410 individuals and consisted of 18 items. Being a semi-structured interview, Evaluation of Competency to Stand Trial – Revised focuses on the examinee's rational and factual understanding of the proceedings as well as rational capability of the defendant to consult with the counsel and the entrenched response style measures. It necessitates and accounts for the examiner's rating of the competence related abilities of the defendant. . The reliability coefficient and the predictive validity is 0.97 and 0.83 respectively. The ECST-R is suitable to be used with individuals aged 18 years or above, who are involved in adult trials. Since the ECST-R was validated on population with an array of cognitive abilities, it is appropriate for use on offenders who have an IQ between 60-69, i.e., borderline and upper level of mild mental retardation It also serves as a measure of feigned incompetency.

7. **Minnesota Multiphasic Personality Inventory (MMPI II)** by Hathway and McKinley, is a standardized psychometric test of adult personality and psychopathology since 1930s. Consisting of 567 items, standardized on a sample of 2600, MMPI II is one of the widely used psychometric tests for various purposes – to help develop treatment plans, as a part of therapeutic assessment, help answer legal questions, screen candidates during personnel selection as well as assist with differential diagnosis. Its reliability index ranges from 0.50 to 0.80 and the validity of the test is 0.90. Notwithstanding its popularity, the MMPI-2 has failed to establish reliable patterns that would assist in predicting relevant legal issues like violence and recidivism rates. It is also important to realize that because of the test's length and

breadth, it requires anywhere between a 5th grade to an 8th grade reading level to complete. This could present serious problems when dealing with poorly educated test takers, test takers who are suffering from a neurological injury, test takers who are under the influence of drugs and alcohol, etc. While MMPI II has been used to provide information about the examinee's response style, personality and psychopathology, it does not include direct information about the functional legal capacities which would then require explicit testing and questioning of the capabilities that are being evaluated (Heilbrun et al, 2009). Current literature also suggests that the evaluator must be thorough with MMPI II to interpret its result- that mean he should have formal training in psychological testing and be aware of the psychometric properties of the test. (Heilburn et al, 2022).

8. **Inventory of legal knowledge** was brought forth by Otto, Musick and Sherrod in 2010, based on a sample of 516 individuals, consisted of 61 items. The ILK assists the forensic examiner in measuring the response style of defendants undergoing evaluation. The ILK is exclusively a measure of response style and not of adjudicative competence. In other words, it tends to measure the defendant's approach regarding his/her legal knowledge. The ILK consists of 61 true or false items about the legal process and takes about 15 minutes to be administered orally. Since it can be administered orally, it is suitable for illiterate defendants as well. The reliability and validity index of the test is 0.76 and 0.88. It is to be noted that the ILK is not a test of adjudicative competence In case the defendant's score is not considerably below chance, then it is compared with the scores of relevant comparison groups. Studies conducted on the detection of feigned knowledge deficits in defendants adjudicated incompetent to stand trial using the ILK have revealed that the cut score create many false positives and hence modifications to the current existing cut-score is required. Studies also suggest that further research is required in order to maximize the predictive validity of the test. (Gottfried et al, 2015).

9. **MacArthur Competence Assessment Tool (Criminal Adjudication)** is an extension of MacArthur Structured Assessment of the Competencies of the Criminal Defendants developed by Hoge et al, in 1997 comprises of three measures each of which relates with one of the Dusky criteria. A total of 22 items judging the understanding and appreciation of the elements of the offence and the logical skills in relation to legal information make up the test. The normative sample consisted of 729 individuals.

MacCAT-CA measures are reliable with internal consistency of 0.85 and has also showcased adequate discriminate validity. Although the MacCAT-CA is structured and has standardized competence related inquiries, it should be substituted for a clinical interview to assess adjudicative competence. MacCAT-CA can only supplement a clinical interview, and not replace it since it does not consider all components that may affect the competence of the defendant. Additionally, clinical judgements regarding the symptoms of mental disorder must still be made if the performance on MacCAT-CA is poor. A heuristic analysis of MacCAT- CA scales conducted by Rogers (2001) suggests that it is a poor match with the Dusky prongs. (R. Rogers, 2001).

CHAPTER III - CRIMINAL JUSTICE THEORY –

The branch of philosophy of law that is intricately associated with criminal justice, and particularly the punishment that is dispensed is called the theory of criminal justice. Other areas of philosophy like ethics, political philosophy as well as criminal justice in practise is deeply entrenched in the theory of criminal justice. Like all other theories of social science, criminal justice theory postulates useful insight into social phenomenon and human behaviour that in turn inform policy and shape practical applications. Although, several diverse theoretical explanations have been provided to understand the cause and consequences of criminal behaviour and crime, three perspectives tend to dominate the field of criminal justice.

The first perspective that focus on the way individuals can heal from the harm caused by crime is called restorative justice theory. It is based on the fundamental premise that the victims of the crime should work together with the perpetrators in order to reconcile and come to a resolution. Thus, it believes in the reintegration of the offender in the community through an understanding or compromise with the victim. At the offset, the offender must take accountability of his/her actions and take the necessary steps to make amends with the victims in order to compensate them and recuperate back in the society.

Restorative justice theory has apprised criminal justice polices so that the needs of the victims can be addressed, rates of recidivism can be reduced, and public safety within the communities may be improved. Moreover, the principles of the theory have been employed in conflict resolution initiatives in school and prison rehabilitation programs.

In complete juxtaposition, retributive justice theory focuses on punishment instead of rehabilitation. This theory believes that the consequence of the crime should be proportionate to the offense committed. This theory postulates that the most successful deterrent to crime is the threat of punishment. The modern approaches to retributive justice theory highlights the role of rational choice. It argues that since humans are rational beings, they are capable enough to make rational choices in order to abide by the laws of society. Anyone who disobeys the law the commits a crime, might do so because it satisfies their needs or it brings them pleasure. Thus, the punishment for such actions must outweigh the pleasure that is derived and cause enough pain to deter them from committing another crime. The principal principle underlying these assumptions is that the individuals will indulge in a cost benefit analysis and the choose to refrain from committing crimes, if the punishment is severe, certain, and swift. Thereby, maximizing pleasure and minimizing pain (the pleasure principle as stated by Freud).

Lastly, transformative justice theory takes a structural standpoint and analyses the social circumstances in which crime is committed, the causes of victimization, the need for reinstatement of the offender, and the establishment or restoration of peace and security. Transformative justice theory essentially believes the criminal justice system to be unjust and critiques the conventional approach of disconnecting the victims and offenders and transforming the offenders into the victims of the justice system. Advocates of transformative justice are against all forms of violence, be it state-sanctioned or individual punishments, institutionalization, or imprisonment. They believe that criminal justice should be deinstitutionalized and communities should be encouraged to make their decisions about hostility, accountability, and recuperation. Instead of retributive and vindictive practices like the death penalty and torture, the advocates of transformative justice propose programs that are based on forgiveness, accountability and inclusive education at community and government levels.

Transformative justice works in an abolitionist framework that perceives the prisons as sites where most violence happens, since they were created in order to maintain social control. The proponents of transformative justice believe that the current institutions which were meant to protect people are partaking in the same violence that they claim to denounce.

Throughout centuries, our society have internalized the attitudes towards perpetrators of crime and victims alike – blame, isolation, and shaming. There have been multiple accounts of survivors recounting how belittling their communities have been once they came out as

survivors. Victimization of survivors continue long after the crime has been committed. Thus, in order to move toward true transformation, we must liberate yourselves from these internalizations.

Therefore, it is very important to distinguish and understand that transformative justice is not about the absence of state-imposed sanctions and violence, but the presence of practices, values, and relationships. It incorporates identifying what we do not want, and proactively practicing the things that we want in the society such as good communication, learning to express our anger in a non-destructive manner, and skills to de-escalate a violent moment.

Transformative justice interventions revolve around community accountability process. Here few members of the community work candidly with the perpetrator to take responsibility of the harm that he/she caused. From there, they work towards understanding the severity of the damage caused, make amends, and change their behaviour, so that such behaviour is not repeated. Most often the survivors just want one thing: *I just do not want them to do this to anyone else. I do not want anyone else to have to go through what I had to go through.*

CHAPTER IV - CONCLUSION –

Transformative justice approaches coupled with appropriate psychological tools developed to suit the demands and the needs of the population can thus facilitate a legal process. Transformative justice tactics can help in destigmatising the concept of crime, perpetrator, and victim alike and it may help in the rehabilitation process of both the parties involved. Destigmatization is especially required in case of mentally disabled individuals, who are not aware of the consequences of their actions. Early identification of such individuals can expediate the course of action and make the proceedings prompt, ensuring an early commencement of required treatment and rehabilitation procedure. During the rehabilitative process, knowledge on accountability and articulation of emotions maybe imparted.

In order to expediate the process, it seems that the existing psychological tools for assessing competency to stand trial are perhaps not suited for the Indian population. Since culturally responsive psychological tests are the need of the hour, they may constitute of the following domains – logical reasoning, factual understanding, psycho-legal abilities (as stated by the

McGarry criteria elaborated above), psychopathology or mental status examinations as well as psycho-lingual abilities.

These domains would help in creating an all-inclusive tool that can effectively detect the competency of an individual to stand trial.

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