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## Group Deliberative Virtues and Legal Epistemology

Amalia Amaya

### 7.1 INTRODUCTION

Collective agents play a critical role in the legal determination of facts. The jury remains the primary fact-finding institution in many legal cultures and multi-member courts are also entrusted, in some legal systems, with the task of determining the facts at trial. Notwithstanding the relevance of group decision-making in evidential reasoning in law, legal epistemology, for the most part, embraces a highly individualistic perspective. A focus on the individual processes of legal decision-making is also a characteristic of attempts to address problems of legal epistemology by using the framework of virtue theory. In this chapter, my aim is to contribute to the study of the social dimensions of deliberation about factual issues in law. More specifically, I will examine the relevance of group deliberative virtues, that is, the traits of character that enable sound group deliberation, to the epistemology of legal proof.

Group deliberation is a highly neglected topic in the burgeoning field of virtue theory. While interesting work has been done on the possibility of attributing virtues to collective decision-making bodies, such as whether the jury was fair, impartial or courageous, the (distinct) issue of which traits of character may foster a genuine and productive group deliberation have been largely obliterated in current virtue-oriented approaches to social epistemology.<sup>1</sup> However, deliberative virtues have been studied in different (and apparently unrelated) bodies of literature, most importantly, virtue politics, communicative theory and argumentation theory. In this chapter, I will draw on work on the deliberative virtues in these domains in order to provide an account of the relevance of group deliberative virtues to legal epistemology.

<sup>1</sup> See Fricker, 2010a; Lahroodi, 2007; Cordell, 2017.

The structure of this essay is as follows. In Section 7.2, I shall propose a typology of the main kinds of traits of character that are virtues in the context of group deliberation about factual issues in law. In Section 7.3, I will defend the value of these virtues by explicating the ways in which they contribute to sound legal decision-making about the facts being litigated on the part of juries and composite courts. Section 7.4 argues that group deliberative virtues help us correct critical deliberative distortions that threaten to undermine group decision-making on disputed questions of fact. I shall conclude by exploring some implications of the argument developed in this chapter for legal education as well as the design of legal fact-finding institutions.

## 7.2 DELIBERATIVE VIRTUES

Group deliberative virtues are those traits of character that foster a productive group deliberation. The criteria for determining whether a trait of character is a deliberative virtue is tied up with the goals of deliberation (see Cohen, 2017: 183). The ultimate end of group deliberation about factual issues in law is the acquisition of true beliefs about the facts being litigated.<sup>2</sup> As in any other deliberative setting, group deliberation about factual issues in law aims at finding the truth in a certain way, namely, through a process of reason exchange. Effective deliberating groups have a positive ‘synergy,’ where such synergy is not only a function of the output – the acquisition of true beliefs – but also of the quality of the argumentative process that results in such an output (see Aikin and Clanton, 2010: 414). Group deliberative virtues are traits of character that enhance group synergy insofar as they promote a kind of deliberative engagement that produces optimal epistemic outcomes.

Now, which traits of character best foster positive group synergy when deliberating about the facts at trial? First of all, members of the jury or composite courts should possess and exercise a number of *epistemic virtues*, such as open-mindedness, intellectual courage, perseverance, intellectual autonomy and thoroughness.<sup>3</sup> Secondly, there are a number of *moral virtues* that are critical to creating a deliberative environment that results in good epistemic outcomes. Friendliness, civility, humility, kindness, cooperativeness, temperance and respectfulness are some of the traits of character that promote the background conditions needed to enable a productive deliberation.<sup>4</sup> Thirdly,

<sup>2</sup> Subject to constraints, of course, deriving from other values that trials seek to protect.

<sup>3</sup> On epistemic virtues, see, among other, Zagzebski, 1996; Montmarquet, 1993; Roberts and Wood, 2007.

<sup>4</sup> On the importance of some of these moral virtues to deliberation see Aikin and Clanton, 2010: 415–20, and Harden Fritz, 2018.

deliberation is first and foremost a process of argumentation and this makes *argumentative virtues* pivotal for securing that group deliberation strikes a positive synergy (Cohen, 2005 and Aberdein, 2010). Willingness to engage in communication, to listen to others, to modify one's position and to question the obvious are some of the dispositions that contribute to enhancing the quality of group deliberation (Cohen, 2017: 183). Finally, group deliberation is a kind of communicative practice. Thus, those engaged in group deliberation should also exhibit a number of *communicative virtues*, such as sincerity, receptivity, and clarity (Cooper, 1994: 465–6).

These kinds of traits of character contribute in various ways to fostering a productive deliberation within the jury or the court. While distinct, there are interesting connections between the different categories of virtues that should not go unnoticed. Epistemic virtues have, of course, an epistemic rationale but they are also morally relevant. For example, there are epistemic reasons to be open-minded, but also moral reasons in that the open-minded person gives minority and marginalized voices a hearing (Aikin and Casey, 2016: 438). Not only there is a moral undercurrent to epistemic virtues, but there is also an epistemic undercurrent in moral virtues. Kindness towards other members of the deliberating group or temperance in the face of the heated emotions that might arise in the midst of the discussion are helpful in getting at the truth, for where there is a cooperative and friendly deliberative climate, people are more willing to share information, more open to criticism and more sincere about their views, all of which positively contribute to better epistemic outcomes. There are also important connections between epistemic and argumentative virtues in that the possession of some intellectual virtues manifests itself in a number of valuable dispositions in the context of argumentation.<sup>5</sup> For instance, the intellectually humble person will be willing to listen to others, question her own views, and revise them accordingly. Finally, communicative virtues are also importantly connected with both argumentative and epistemic virtues. For example, clarity in stating one's views is a critical virtue for a successful proponent and receptivity is central to genuinely exhibiting open-mindedness.

It is also important to notice that deliberative virtues contribute to group synergy both synchronically and diachronically. Group synergy depends not only on how a group deliberates at a time but also on whether it performs well over time (see Aikin and Clanton, 2010: 414). This distinction is critical in the

<sup>5</sup> There is some controversy on how to distinguish argumentative virtues from epistemic virtues, see Aberdein, 2010: 173; Aikin and Clanton, 2010: 421; Aberdein, 2014: 88–9; and Cohen, 2007: 4–5.

context of legal fact-finding for jury deliberation may extend over the course of several sessions and court members are likely to sit often in the same court within a given jurisdiction. Deliberative virtues create a deliberative environment that facilitates a truth-conducive deliberation both at a specific instance of group deliberation about the facts being litigated and over the course of a trial or several trials. For example, civility ‘keeps the avenues of communication open and it promotes continued dialogue’ (see Cohen, 2017: 182), which is arguably essential to secure not only a productive deliberation at a given time but also the well-functioning of a jury or a multi-member court in the longer run.

### 7.3 THE VALUE OF DELIBERATIVE VIRTUES

Deliberative virtues facilitate, as argued, group synergy, which is a function not only of the goodness of the outcome but also of the quality of the deliberative process in both a synchronic and a diachronic dimension. Insofar as group deliberative virtues enable a productive group deliberation, they are valuable, I would argue, from an epistemic, practical and moral-political point of view.

#### 7.3.1 *Epistemic Value*

Group deliberation often outperforms individuals in producing good epistemic outcomes. There is, as it were, a ‘wisdom of the crowds’ (Surowiecki, 2004) that the law may benefit from by entrusting fact-finding to composite bodies. Group deliberation may lead to epistemic results which are not only superior to those reached by solitary deliberation, but also better than the statistical averaging of individual views within a group. There are also, however, as will be discussed below, important risks in group deliberation – which may lead group deliberation seriously astray. Thus, it is critical to determine the conditions under which group deliberation is likely to strike a positive, rather than a negative, group synergy. There are several conditions concerning the composition of the group – in terms of gender, social status, expertise, race or cognitive diversity – that have been shown to have a significant impact on the quality of group deliberation (see, among others, Karpowitz and Mendelberg, 2007). The norms that structure deliberation (e.g. unanimity rule versus majority rule) are also an important factor that determines whether group deliberation is likely to be effective (Karpowitz and Mendelberg, 2007: 649). The character of individual deliberators and, more specifically, the extent to which they possess and exercise the deliberative virtues has

a momentous influence in the truthconduciveness of group deliberation as well. Thus, group deliberative virtues – in conjunction with other criteria – are crucial for increasing the epistemic credentials of collective determinations of facts in law.

### 7.3.2 *Practical Value*

Accurate determinations of fact in law are to be reached in a specific way, namely, through the dialectical exchange of reasons with a view to solving disagreement and reaching consensus (or a qualified majority, in some legal systems). Thus, even if deliberation about factual matters in law is oriented towards the search for truth, it also has practical goals (i.e. the resolution of conflict) that are to be reached by argumentative means (rather than by flipping a coin or striking a bargain, for example). Group deliberative virtues are instrumental to the goal of resolving conflict by the force of argument. Argumentative and epistemic virtues are pivotal for promoting an effective group deliberation about the contested evidence and the beliefs about the facts under dispute and have thus an important dialectical value. Moral and communicative virtues help generate a deliberative environment that enables the group to successfully deal with disagreement and reach consensus (or at least a qualified majority). Critically, they are essential in bringing about the cooperative background that is needed for an argumentative practice to rationally solve conflict.<sup>6</sup> Thus, there is a practical rationale (in addition to an epistemic one) for promoting the possession and exercise of group deliberative virtues within legal fact-finding bodies.

### 7.3.3 *Moral-Political Value*

Legal fact-finding collegiate bodies (whether the jury or the court) are sites for public deliberation. As such, they are expected to conduct deliberation in a way that realizes the moral and political values enshrined in the legal and political culture. Group deliberative virtues, I would argue, contribute to bringing group deliberation about factual issues in law closer to the exemplary deliberative practice that is characteristic of a well working democracy. To begin with, the epistemic and practical reasons that have been given in support of group deliberative virtues have a moral and political import. To be sure, that factual determinations be accurate and reached through a rational process is a pivotal element of a democratic system of justice. Thus, to the extent that deliberative virtues help groups achieve epistemically justified outcomes and

<sup>6</sup> On argumentation as a cooperative practice, see Gensollen, 2017.

rationally solve disagreement, they contribute to the realization of important democratic values. However, the relevance of group deliberative virtues for the affirmation of democratic values goes beyond their role in facilitating group deliberations that aim at the truth by way of argument. Group deliberation about factual determinations in law is also a critical public venue for social interaction and deliberative engagement among citizens and judges. In virtuous group deliberation, participants relate to each other with civility, kindness and respect; there reigns an egalitarian ethos that yields an inclusive deliberative environment in which different views are given a hearing and taken seriously; and argument exchange is done against a background of cooperation in pursuit of common ends. Given that all these features are a landmark of the kind of social relationships and deliberative endeavours that a democracy aspires to establish and promote, group deliberative virtues may be also justified on moral and political grounds.

#### 7.4 GROUP-DELIBERATIVE VIRTUES AND DELIBERATIVE DISTORTIONS

Thus far I have argued that group-deliberative virtues (1) help groups reach epistemically justified outcomes; (2) contribute to successfully deal with disagreement and reach consensus; (3) generate a deliberative climate where (1) and (2) occur. Furthermore, I have argued that group-deliberative virtues not only help juries and courts effectively reach a decision about the facts being litigated that is based on epistemically sound factual determinations, but also enhance the moral quality of the deliberative process whereby such decisions are made. Now, I would like to argue that group-deliberative virtues, in addition to having a positive role in enabling productive group deliberation, also play a negative, remedial, role in that they may prevent certain distortions that threaten to taint group deliberation from arising.

There are four kinds of phenomena that distort group deliberation, with the result that groups often do not improve on and sometimes even do worse than their average median member.<sup>7</sup> These phenomena may result in the group converging on falsehood rather than truth. The four kinds of deliberative failure are as follows:

- (1) *Amplification*. As is well known, individuals use heuristics that lead them to predictable errors and they are also subject to a number of identifiable bias (see Kahneman, 2011). There is significant evidence

<sup>7</sup> See Sunstein and Hastie, 2015, ch. 1. See also Luskin et al., 2017.

that shows that individual cognitive errors are usually amplified as a result of group deliberation.

- (2) *Homogenization*. Deliberation usually reduces variance as shared information crowds out information that is held by one or few members (common-knowledge effect) and people follow the statements of their predecessors, ignoring their private knowledge (cascade effects).
- (3) *Polarization*. Members of deliberating groups end up adopting a more extreme version of their pre-deliberative tendencies.<sup>8</sup>
- (4) *Domination*. The attitudes of members of deliberating groups shift towards the attitude of their socially advantage members.

There are two main reasons that help explain these deliberative failures. The first source for these failures is informational influences, that is, if group members share a particular belief, isolated or minority members might not speak out on the grounds that their own judgement must be wrong. A second reason for self-silencing involves social, rather than informational, influences in that people in a minority position might silence themselves out of fear for social sanctions, such as the risk of suffering reputational injury, being ridiculed, disliked or disapproved.<sup>9</sup>

Several strategies have been proposed to overcome the foregoing problems and increase the likelihood that group deliberation will outsmart individual deliberation (see Sunstein and Hastie, 2015: ch. 6). My suggestion is that group deliberation is more likely to avoid deliberative distortions when group members embody the deliberative virtues. The claim is thus that deliberative virtues play a corrective role in that they prevent group deliberation from falling victim to amplification, polarisation, homogenisation and domination. In so doing, they crucially aid to achieve the aims of deliberation, as these phenomena make it less likely that the truth will emerge as a result of group deliberation and yield deliberative processes where consensus is impaired (polarisation) or badly reached (homogenisation and domination). As both psychologists and philosophers have argued, the virtues of character provide a way to correct a number of heuristics and biases that lead to systematic errors in individual reasoning.<sup>10</sup> Similarly, virtuous character traits may arguably help correct the epistemic functioning of groups.<sup>11</sup>

<sup>8</sup> The phenomenon of group polarisation is well documented and there is also considerable support for the claim that group polarisation might also take place in multi-member courts. See Sunstein, 2000: 102–4.

<sup>9</sup> See Sunstein and Hastie, 2015. See also Sunstein, 2008: 65–9.

<sup>10</sup> See Kahneman, 2011: 46; Stanovich, 2009: 69; Roberts and West, 2015; Samuelson and Church, 2015; Bruin, 2013; and Correia, 2012.

<sup>11</sup> This point is also argued by Talisse, 2007: 51.



A first way in which deliberative virtues may mitigate deliberative distortions is, precisely, by way of attenuating individual cognitive biases. As explained, the amplification of individual's cognitive errors is one of the reasons for deliberative failure. Thus, and pretty straightforwardly, the epistemic performance of a group will improve if there are fewer individual errors that may be augmented as a result of group deliberation. In addition, some biases have been shown to aggravate deliberative failures, such as group polarisation, so the correction of individual biases indirectly ameliorates group deliberation by mitigating the import of these failures (see Correia, 2012: 227).

Deliberative virtues also directly address the two main forces driving deliberative distortions, to recall, informational and social self-silencing. Self-silencing on the grounds that one's beliefs are likely to be incorrect given that they are contradicted by the majority position would arguably be less likely if individual deliberators are intellectually autonomous. Social self-silencing may also be attenuated if those in a minority position exhibit courage, which would be greatly facilitated if there is a cooperative and friendly deliberative environment, and those in a majority position are willing to listen to other viewpoints and show proper respect.

Deliberative virtues may effectively reduce the specific failings involved in group polarisation, homogenisation and domination as well. Group polarisation may be attenuated if individual deliberators have some key epistemic virtues, such as open-mindedness and intellectual humility, argumentative virtues, critically, willingness to listen to others and to modify one's position and moral virtues, like prudence or temperance. These virtues, among others, will help group deliberators to deal with disagreement and reach consensus, thereby avoiding problems of hung juries and difficulties associated to the court's reaching a joint judgment – which might compromise the group synergy of the court in future cases. Homogenisation –through both the cascade and the common knowledge effects – is less likely to take place if members of the jury and collegiate courts are tenacious, inquisitive and intellectually energetic – rather than simply following the lead of those who first happen to express their views, have a willingness to question the obvious – even when deeply held beliefs shared by the group are at stake, have intellectual autonomy, and thus are able to come up with their own independent views about the case instead of falling back on previously stated positions or uncritically accepting shared views within the group. These traits of character, among others, will enable group deliberation to reach a verdict that is fully responsive to the different perspectives held by the group members and that is properly informed by the range of information and reasons available within

the group. Domination is also mitigated when individual deliberators are humble – and thereby committed to an egalitarian stance,<sup>12</sup> civil and respectful, all of which generate a climate in which group members cooperate on an equal footing and social disadvantage does not translate into loss of credibility or lack of participation.

The claim that deliberative virtues may correct deliberative distortions may be questioned on the grounds that these distortions operate automatically and unconsciously, and thus are difficult to control even by the most well-intentioned member of the jury or the trial court.<sup>13</sup> However, there are several reasons why the seemingly unconscious and automatic nature of these failures does not detract from the remedial value of deliberative virtues. First, the virtues, once inculcated, become a kind of ‘second nature’, so that the virtuous response is in many cases automatic and does not require a conscious effort on the part of the individual deliberator (see Correia, 2012: 234 and Fricker, 2010b). In this sense, it may often counteract the unconscious process that leads to deliberative failures without taxing our cognitive resources and with the rapidity and efficacy required in contexts of legal decision-making about facts that are limited by severe time constraints.

Second, virtue, even if habitual, does involve in difficult cases a proper amount of reflection. Reflective abilities, alongside intuition, form the core of virtuous deliberation. For example, one may need to engage one’s reflective abilities in order to determine when one needs to be open to other’s peers arguments and when, to the contrary, one should ignore indefensible views or irrelevant objections.<sup>14</sup> Thus, hitting the right mean in a particular deliberative context may require a conscious effort on the part of the deliberator. Reflection may also be called for to deliberate in situations in which the virtues impose conflicting demands upon one’s behaviour, for instance, to address conflicts between intellectual autonomy and intellectual humility or between willingness to modify one’s position and intellectual integrity. In addition, virtue acquisition is the result, at least partially, of a conscious effort on the part of the individual. Just as self-reflective regulation has been shown to be an effective safeguard against a number of cognitive bias, which are also automatic and unconscious, virtuous deliberation – insofar as it involves conscious

<sup>12</sup> On the connection between humility and egalitarianism in the context of legal decision-making, see Amaya, 2018.

<sup>13</sup> This is an objection analogous to the objection according to which virtue cannot correct for non-volitional prejudices. On this objection, see Anderson, 2012; Alcoff, 2010. For a reply, see Fricker, 2010b.

<sup>14</sup> On failing to be open-minded by the vice of excess, see Aikin and Casey, 2016: 439 and Cohen, 2009.

reflection – may also be capable of mitigating deliberative distortions, even if these distortions, are, like individual cognitive biases, non-volitional (see Fricker, 2010b).

Third, structural remedies may nudge virtue remedies. Different structural mechanisms may be put in place to foster virtuous deliberation (see Anderson, 2012: 168). If deliberative virtue has not been practised enough to become habitual and if the reflective capacities involved in virtue have not been developed to a degree sufficient to enable virtuous responses in difficult situations, we can still facilitate the exercise of deliberative virtue in those that are less than virtuous through institutional design. Fact-finding institutions may structure jury and court deliberations in ways that enable the exercise of virtuous dispositions: for instance, one may indirectly promote impartiality by instructing jurors to seriously consider alternative views<sup>15</sup> and foster open-mindedness by asking them to overshoot on the side of charity in interpreting arguments, since we are naturally disposed towards dogmatism.<sup>16</sup> Norms of deliberation and even the framing of the deliberative setting may prove instrumental to nudging group deliberation in accordance to virtue.<sup>17</sup>

Thus, deliberative virtue may be effective in correcting deliberative distortions even if these operate at an unconscious level. This is not to say, of course, that virtue is the only way to avoid deliberative failures. There is an array of strategies, which are not virtue based, for structuring group deliberation that may prove useful for reducing deliberative failures, for example, the Delphi method – which involves the anonymous statement of private opinions prior to deliberation – or rewarding success (see Sunstein and Hastie, 2015: ch. 6). In addition, addressing deliberative failures seems to require structural remedies that go well beyond the design of fact-finding deliberative environments. Indeed, as seen, social segregation is a major factor leading to group dynamics that result in distortions in deliberation. Thus, large-scale social changes seem necessary to promote the kind of social of integration that is conducive to the well-epistemic functioning of group deliberation.<sup>18</sup> While important, the deliberative virtues – whether individually inculcated or structurally triggered – provide only part of the solution to the problem of deliberative distortions.

<sup>15</sup> This is the ‘consider the opposite’ instruction. See Simon, 2004.

<sup>16</sup> As demanded by the Aristotelian doctrine of compensation, see Aikin and Casey, 2016: 439.

<sup>17</sup> Even if, admittedly, they may not suffice to elicit genuinely virtuous behaviour. For a discussion of this objection, see Horowitz, 2009: 65–70.

<sup>18</sup> On group integration as a structural remedy for the lack of epistemic justice as an individual virtue, see Anderson, 2012: 171.

## 7.5 CONCLUSIONS

Legal determinations of fact are oftentimes the result of collective deliberation and this makes it imperative that the epistemology of legal proof pay attention to the social aspects of evidential reasoning in law. In this chapter, I have suggested that virtue epistemology may prove to be a useful framework for addressing the social dimensions of legal arguments about evidence and proof. More specifically, I have argued that deliberative virtues are critical for ensuring sound group deliberation. Communicative, epistemic, moral and argumentative virtues importantly contribute to realizing a number of values – epistemic, practical as well as moral and political values – which lie at the core of legal fact-finding institutions. In addition, they also have a momentous remedial value in that they provide a corrective to a number of deliberative distortions that undermine the epistemic well-functioning of group deliberation.

The claim that group deliberative virtues have an important place in the social epistemology of legal proof is not hopelessly idealistic, but it has important implications for both public policy and legal reform. In order to ensure virtuous group deliberation, it is necessary to shape citizens education and legal education so that there are opportunities for discursive engagement and training in the practice of argumentation. The design of fact-finding institutions is also pivotal to create the conditions under which virtuous dispositions are triggered. Larger structural reforms – as argued – are ultimately needed to bring about the kind of group integration which results in good epistemic outcomes. At the end of the day, virtuous group deliberation requires nothing less than the inculcation of civic virtues and an egalitarian ethos, both of which are necessary for a properly functioning democracy. Thus, the epistemological concerns driving inquiry into the inner workings of group determinations of legal facts end up overlapping with distinctively political concerns. In short, a virtue approach to the epistemology of legal proof turns out to be inextricably linked with a virtue politics.

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