

Maharashtra defection quandary and a trail of legal questions

With the new govt in place, the petition before the SC may be considered 'infructuous', but constitutional questions remain



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Maharashtra CM Eknath Shinde and Deputy CM Devendra Fadnavis. Credit: PTI Photo

For many, the political dilemma in Maharashtra concluded on Thursday with the swearing-in of rebel Shiv Sena legislator Eknath Shinde as the 20th Chief Minister of Maharashtra and Devendra Fadnavis as the Deputy CM. Looking at the progress, the political dilemma in Maharashtra appears to have settled beyond doubt. But is it over?

The 10th Schedule of the Constitution

The 10th Schedule of the Constitution, brought in through the Constitution (52nd Amendment) Act, 1985, is also known as the anti-defection law. It provides for the disqualification of MLAs who "voluntarily give up their party membership" after being elected on the ticket of a political party, defying the whip issued by the party leadership, or being absent on a crucial vote in the legislature. The law also applies to independent legislators as they are prohibited from joining any political party during their tenure in the legislature. Similarly, a nominated legislator is prohibited from joining any political party after the lapse of six months from the date on which s/he takes their seat.

Interestingly, the law also stipulates certain exemptions and safeguards. In an amendment to the 10th Schedule by the Constitution (91st Amendment) Act, 2003, the law does not apply if the legislators constitute two-thirds of the party's strength in the legislature. In this case, the law suggests that the legislators will have to merge with another party.

With this limited understanding of the law, let us return to Maharashtra's political dilemma.

A case of defection versus defection

In an unprecedented move, Shinde claimed that his faction was the 'real Shiv Sena'. He also clarified that he had not abandoned the party. However, he resented Uddhav Thackeray's decision to form and continue in a coalition government with the Congress and NCP. To stress this point further, he also placed his claims on the numerical strength of the rebel MLAs. With a majority of Shiv Sena legislators by his side, Shinde claims to be leading the party.

This move, however, has raised two critical questions, and it would be interesting to analyse them in the background of the 10th Schedule of the Constitution.

The first. Which claimant group is the 'real Shiv Sena'? In a de-facto split within a political party, where competing factions claim to be the 'original', the power to rule on such matters rests with the Election Commission of India. The EC relies on The Election Symbols (Reservation and Allotment) Order, 1968, to arrive at a decision. Besides the stipulated order, the EC may also refer to Supreme Court judgments such as *Sathi Vijay Kumar vs Tota Singh & Others* (2006).

The EC shall also look into the organisational structure and leadership of the party. The legislature party (or the legislators) is a subset of the 'original' political party. Therefore, the EC shall take cognisance of 'who administers the party functions' before the adjudication. Given the above, one can infer that, technically, the numerical strength of the defecting faction has 'limited or no bearing' on the decision of the EC.

This brings us to the second question. Who is the real defector? Under normal circumstances, the Speaker (or the Deputy Speaker) may proceed to adjudicate under the 10th Schedule on receipt of a petition. Technically, any MLA can file a petition with the Speaker claiming that 'so and so' MLAs have defected from their political party. Such a petition has to be accompanied by adequate and relevant documentary evidence.

The Speaker would then forward the petitions to the legislators in question, seeking their response. The concerned legislators would have 'seven days or such time that the Speaker decides is sufficient' to file their response. In the current context, the Deputy Speaker of the Maharashtra Legislative Assembly, Narhari Zirwal, issued disqualification notices to 16 rebel MLAs of the Shiv Sena on June 25 and asked them to submit their response by 5 pm the next day. This may be considered 'too short'. To seek protection from disqualification, Shinde and the other rebel MLAs filed a writ petition in the Supreme Court. In the ruling that followed, the apex court deferred Deputy Speaker's ruling on disqualification till July 11, which may be considered 'too long'.

In the present context, with about 40 legislators by his side, Shinde and the rebel MLAs may elude the hanging sword of defection. Thackeray has already tendered his resignation to the Governor. With the new government in place and Shinde at its helm, the petition before the Supreme Court may be considered 'infructuous'. According to some legal experts, given the claim by Shinde as the 'real Shiv

considered 'infructuous'. According to some legal experts, given the claim by Shinde as the 'real Shiv Sena' owing to the control of more than two-thirds of the MLAs, the Thackeray group may appear to be the rebelling camp and may have to file a fresh petition before the Court. And the Speaker may have to deal with two separate defection applications. This takes us back to the question: who is the real defector?

Should we revisit the anti-defection law?

Going by the legal provisions, the Thackeray-led group may be deemed the 'real Shiv Sena'. The law says that the party that gave tickets during the previous elections is the original party, and in the present scenario, it is that of Thackeray. Even if we choose to go by the EC's record, it favours Thackeray. The burden of proof lies with Shinde to prevent the disqualification of himself and other rebel MLAs.

The political dilemma in Maharashtra casts some serious doubts on the effectiveness of the 10th Schedule. The Constitution (91st Amendment) Act 2003 introduced 'merger' as an exemption to the anti-defection law. However, as we can observe from the events during the last ten days, the said provision stands violated. The rebel MLAs have neither resigned from their membership in the legislature nor have they surrendered their party affiliation. Therefore, the time has come to deliberate on 'revisiting the law' itself.

One way to prevent misuse of the law is by amending the provisions of the law dealing with the mandatory requirement of merger and allowing the defectors to remain in the house as a separate group. By doing so, the defecting legislators will not face the compulsion of a merger as the forced merger is as undemocratic as forced whip or forced leadership in a democratic system.

Another aspect is the absence of a disability provision in the 10th Schedule. In this context, PDT Achary, former secretary-general of the Lok Sabha, has said, "Currently, the anti-defection law doesn't create any disability. Currently, if a legislator's election is set aside on the grounds of corruption, then s/he will be disqualified for six years from contesting polls. Similarly, if a person commits a criminal offence that carries a punishment of more than two years, then that person will be disqualified and will remain disqualified for another six years after s/he serves the sentence. Such a disability is not created here by the anti-defection law. If you defect today, you will be disqualified tomorrow, and the day after tomorrow, if an election is held, you can stand for election and come back to the house. The law has been designed that way." In other words, the conspicuous neglect of any such remedial action has weakened the anti-defection law.

Coming back to the political dilemma in Maharashtra, if we assume that Shinde and other rebel legislators were disqualified and with no government in place to conduct day-to-day affairs in the state, the rebel lot would still be eligible to contest elections even if they were to be scheduled for the very next day on which the disqualification happened.

Today, Maharashtra has a chief minister and a deputy chief minister. The state will have a new council of ministers in the coming days. It would be equally interesting to wait for the EC's ruling on the 'real Shiv Sena' and the Supreme Court order on the disqualification of rebel MLAs. But the original question about the political dilemma in Maharashtra remains: is it over?

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