

The Whistleblowers Protection (Amendment) Bill, 2015: A Critical Analysis

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Abstract: *The whistle blowing legislation is required to encourage people to share confidential information about wrongdoing and corruption. Whistle blowing is a weapon in the hands of an employee of a public organization to disclose wrongdoings within the concerned department to authorities with an intention to put an end to them. Whistle blowing requires courage and determination. This present research paper critically analyzes The Whistleblowers Protection (Amendment) Bill, 2015.*¹

Keywords: *Whistle blowing , corruption, disclosure, public organizations.*

1. Introduction

The whistle blowing legislation is required to encourage people to share confidential information about wrongdoing and corruption, unethical activities etc in the public-interest.² Whistle blowing is an attempt by an employee of a public organization to disclose wrongdoings within the concerned department to authorities with an intention to put an end to them.³ Whistle blowing requires courage and determination. In India there is lack of proper implementation of whistleblowers laws due to various hurdles existing in the country. In the year 2014 the law was passed in order to protect the whistleblowers, but still this law was not enforced. In the year 2015 the amendment bill , 2015 was introduces in the Parliament , however this amendment is still pending in the Parliament.

2. Salient Features of the Bill, 2015

NDA Government introduced the Bill in order to amend “*the Whistleblowers Protection Act 2011*”(herein after to be referred as *Act, 2011*) in the context of national security on May 11, 2015 in Lok Sabha. Civil society stakeholders doubtful that whistleblower would no longer be

² Aditya Pratap Singh and Niket Anand, “Public Interest Disclosure and Protection of persons Making the Disclosures Bill, 2010: Critical Appraisal”, *Company Law Journal*, Vol.3, No. 1. (July 2013) 27.

³ Shreekumar K. Nair, “The Ethicality of Whistleblowing and its Implications for Human Resource Management,” *Indian Journal of Industrial Relations*, Vol.38, No. 1 (July 2002) 97.

protected if this Bill be passed. Furthermore, the whistleblower would also not be allowed to disclose any information under whistleblower law that are also exempted under “the Right to Information Act, 2005”(hereinafter to be referred as to be Act, 2005). Anonymity of whistleblowing is also not recognized under the principal Act, 2011 and Bill, 2015.

2.1. “The Whistleblowers Protection (Amendment) Bill, 2015”(hereinafter to be referred as Bill, 2015) introduces amendment in Section 3(d) of the 2011

However, Bill 2015 introduced amendment in section 3(d) of the Act, 2011 in which the word ‘complaint’ used in the opening lines of section 3(d) shall be substituted with the word disclosure.

2.2.Public Interest Disclosure under the Bill, 2015

The Bill, 2015 introduces amendment in Section 4 of the Act, 2011. The Act of 2011 under section 4(1) allows disclosure which is prohibited under the provisions of “the Official Secrets Act, 1923”(herein after Act, 1923) . The proposed amended section 4(1) takes away such immunity. Further, the Amendment Bill 2015 introduces amendment in section 4(1) by inserting section 4(1A). It prohibits the disclosure of corruption which is already prescribed under section 8 of the Act, 2005.

- **National Interest:** Section 4(1A) (a) of the proposed amendment prescribes that the public interest disclosure shall not be made to the competent authority if such disclosure is against the national interest of the state etc..
- **Disclosure which is forbidden by the Court of Law :** The proposed amendment prescribes that public interest disclosure shall not be made to the competent authority if the court of law prohibits the same and if such disclosure has been made then such disclosure may constitute contempt of court. ⁴
- **Breach of Privilege of Parliament or State Legislature:** Section 4(1A)(d) of the proposed Amendment Bill, 2015 contain a provision that public interest disclosure shall not be made if such disclosure is against the Parliament or State Legislature.
- **To protect the Commercial Confidence and intellectual property rights:** This exemption has been provided in order to protect the interest of persons involved in trade

⁴ Section 4(1A) (b), The Bill, 2015

and commerce and of those who have intellectual property rights. The only exception with regard to it is if the information is received as an outcome of a Act, 2005. It prescribes that the public interest disclosure shall not be made if such disclosure harms the competitive position of a third party. It further declares that if any information cannot be disclosed under Act, 2005 then such information shall not be disclosed under the proposed amendment Bill, 2015.⁵

- **Fiduciary Relations:** Section 4(1A) (e) of the proposed Bill, 2015 provides that any information regarding fiduciary capacity shall not be disclosed. It further declares that if any information cannot be disclosed under Act, 2005 then such information shall not be disclosed under the proposed Bill, 2015.
- **International Relations:** The proposed Bill, 2015 prescribes under section 4(1A) (f) that any information which affects the international relations shall not be disclosed under the bill, 2015 even in the public interest.
- **Assistance given in Confidence to Law enforcing Agencies:** Such information shall not be disclosed , if such disclosure would endanger the life of any person. Any information which is required for law enforcement agencies for the purpose of inquiry , investigation shall not be disclosed under the provisions of amendment Bill, 2015 even in the public interest.⁶
- **Impeding the Process of Investigation:** Such information shall not be disclosedPublic interest if that information would prevent the process of investigation.⁷
- **Cabinet Proceedings:** Section 4(1A)(i) of the proposed amendment declares that the minutes of the cabinet proceedings shall not be disclosed.
- **Personal Information:** The proposed Bill 2015 makes it clear that personal information shall not be disclosed even in the public interest. . It further declares that such information cannot be disclosed under the Act, 2005 then such information shall not be disclosed under the proposed Bill, 2015.⁸

⁵ Section 4(1A) (d),of the Bill, 2015

⁶ Ibid, Section 4(1A) (g) of the Bill, 2015

⁷ Ibid, Section 4(1A)(h) of the Bill, 2015

⁸ Ibid, Section 4(1A)(j).

2.4. The Bill, 2015 Prevent Competent Authority to inquire into the Matter

The Bill 2015 introduces amendment in section 5 by inserting new sub-section 5(1A) of the Act, 2011.

- **Competent Authority cannot inquire the whistleblowers complaints:** Section 5 sub-section (1A) of the proposed Amendment Bill, 2015 is amended with a view to prevent the Competent Authority from inquiring into whistleblower complaints regarding the matters as prescribed in the proposed Section 4(1). Under the proposed amendment Bill, 2015 it declares that any information which is against the national interest, any information which affects the international relations with other states etc., shall not be disclosed even in the public interest.⁹ Competent Authority before proceeding further in order to inquire into the matter under section 4 (1A) of the proposed bill consult the designated authority .The Whistleblowers Protection (Amendment) Bill, 2015 provides under section 4(1A) the restrictions are in addition to ones that are provided under the Right to Information Act, 2005. “Section 8 of the RTI Act, 2005 is an attempt to harmonize the public interest with the individual’s right to information. Though the Act envisages imparting a progressive and participatory right to the citizens in a meaningful manner, still the wider national interest have to be harmonized in it. Notwithstanding the transparency of governance as the cherished goal, some essential confidential ingredients of governance cannot be ignored or given up. Therefore, section 8 contains the details of certain categories of information which have to be kept out of the purview of the Act to the extent it is provided therein.”¹⁰
- **“Decision of Designated Authority shall be binding on the Competent Authority”:** Section 5 sub-sections (1A) further prescribes that the competent authority shall not consider any matter under this proposed bill if the designated authority certifies that such matter comes within the purview of proposed Section 4(1A). In this regard, the decision of the Designated Authority shall be binding on the Competent Authority.

⁹ Retrieved from <https://thewire.in/158568/rajya-sabha-whistle-blowers-act-amendments> , visited on June 23, 2017.

¹⁰ Dr. Abhe Singh Yadav. *Right to Information Act, 2005- An Analysis* (Allahabad: Central Law Publication, 2009) 42.

4. Shortcomings in Bill, 2015

The Central Government on May 7, 2015 passed amendments to the Act, 2011. These amendments introduced with a view to provide safeguards against disclosures of any information, which may affect the sovereignty, integrity, and security of the country. The Bill, 2015 introduced in the Lok Sabha on May 11, 2015 in order to amend the Act of 2011.¹¹ Following are some shortcomings of this Amendment Bill, 2015 which are as follows:-

❖ It makes very difficult for whistleblower to complaint

The Act, 2011 is crucial in exposing corruption in the country. However, the proposed Amendment Bill, 2015 will make action on complaints by whistleblowers more difficult, and they can face prosecution. It will discourage people to come forward and expose wrongdoing and corruption in the larger public interest.

❖ The vulnerability of information seekers

The Amendment Bill, 2015, has endangered whistleblowers as well as right to information activists who makes disclosures in the public interest. However, the original law was enacted with a view to protect whistleblowers and right to information activists who disclose information and raise their voice in the larger public interest.

❖ No Immunity Provided under the Act, 1923

The amendments do not provide immunity to whistleblowers while making public interest disclosures. Whistleblowers shall be prosecuted if they make any disclosure, which is prohibited under Act, 1923. The amendment bill removes the provision in the Act, 2011 which provides protection to the whistleblowers from prosecution under the Act, 1923. The purpose of the Act, 2011 is to encourage people to come forward and report wrongdoing and corruption in the larger public interest. Section 4(1) is to be amended with a view to impose unreasonable restrictions on whistle blowing.

❖ Dilutes the provisions of the Act, 2011

As per the proposed Amendment Bill, 2015 a whistleblower is prohibited from making a complaint about wrongdoing under the proposed Section 4(1A) of the Bill, 2015.

❖ Restriction imposed on public interest disclosure

¹¹ Retrieved from <http://www.livemint.com/Politics/NR0Phy7kcYFYdk1Pl3hD9I/Whistle-blowers-law-amendments-introduced-in-Lok-Sabha.html> visited on June 14, 2017.

The Bill, 2015 also provides that any information shall not be disclosed by the whistleblower if it is against the :-

- national interest of the country,
- international relations with other states.
- commercial confidence,
- competitive position of a third party .

❖ **Prevent Competent Authority to inquire the Matter**

The Amendment Bill, 2015 provides that competent authority shall not inquire into the matter without the permission of the designated authority (which is authorised by the central and state government) and the decision of the designated authority shall be binding on the competent authority.

3. OBJECTIVE OF THE STUDY

To analyze and deliberate upon the statutory provisions regarding Whistleblowers Protection (Amendment) Bill, 2015

4. HYPOTHESIS

The proposed Bill, 2015 tries to dilute the original Act, 2011 by way of imposing unreasonable restriction on whistleblowing.

5. RESEARCH METHODOLOGY

The present study is doctrinal as well as empirical in nature. The researcher has use of both primary as well as secondary sources. The primary data is collected on the selected 100 respondents of four districts of Punjab. Questionnaire method has been adopted in this research paper.

- 1. Do you think that the Bill, 2015 tabled in the Parliament if passed, no one will be provided protection under the Act, 2011?**

FIGURE: 1

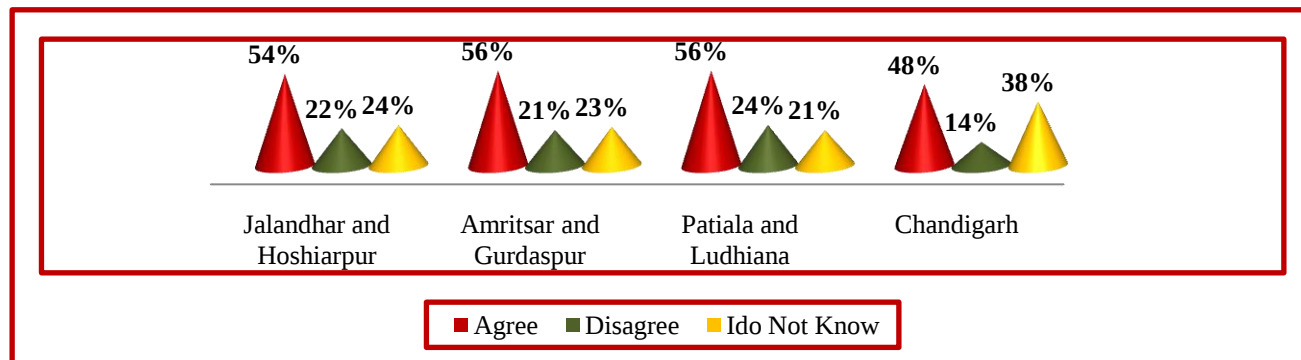


Figure No. 1 of this questionnaire reveals that respondents from categories I, II and III are quite similar. Towards option one ('agree') their responses (category wise) are 54%, 56% and 56% respectively. Option two ('Disagree') has also gathered similar support i.e. 22%, 21% and 24% respectively from the said categories. So far as option three ('I do not Know') is concerned the percentage of response is 24%, 23% and 21% respectively from categories I to III. Respondents from category IV are varying on option one, two and three from rest of the categories. They have given 48% response in favoured of option one and 14% response in favour of option two while 38% response in favour of option three.

2. Do you think that if whistleblowers are prosecuted(as provided by amendment Bill 2015) for disclosing information as part of their complaint and are not granted immunity from the Act of 1923, the very purpose of the law will be defeated?

FIGURE: 2

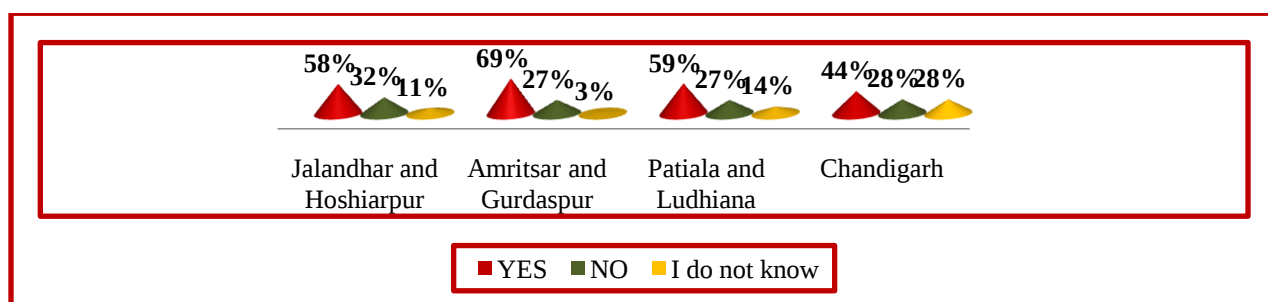


Figure No. 2 depicts that, respondents of categories I, II and III with a considerable majority considered that the purpose of whistleblowers protection law is to provide protection to whistleblowers if they disclose any corruption and wrongdoing in the government organization. Respondents from category I have given 58% response to the

option one ('yes'), category II has given 69% response in favour of the said option. While category III have given 59% and category IV have given 44% response in favour of the said option. The second option ('no') has been less favoured by respondents of last three categories i.e. 27%, 27% and 28% while category I have given 32% response in its favour. Least response has been given to the third option i.e. 11%, 3% and 14% by the respondents from category I, II and III respectively. While category IV have given 28% response to option three.

3.Do you think that The Bill 2015 Bill tries to dilute the Act of 2011 by?

FIGURE: 3

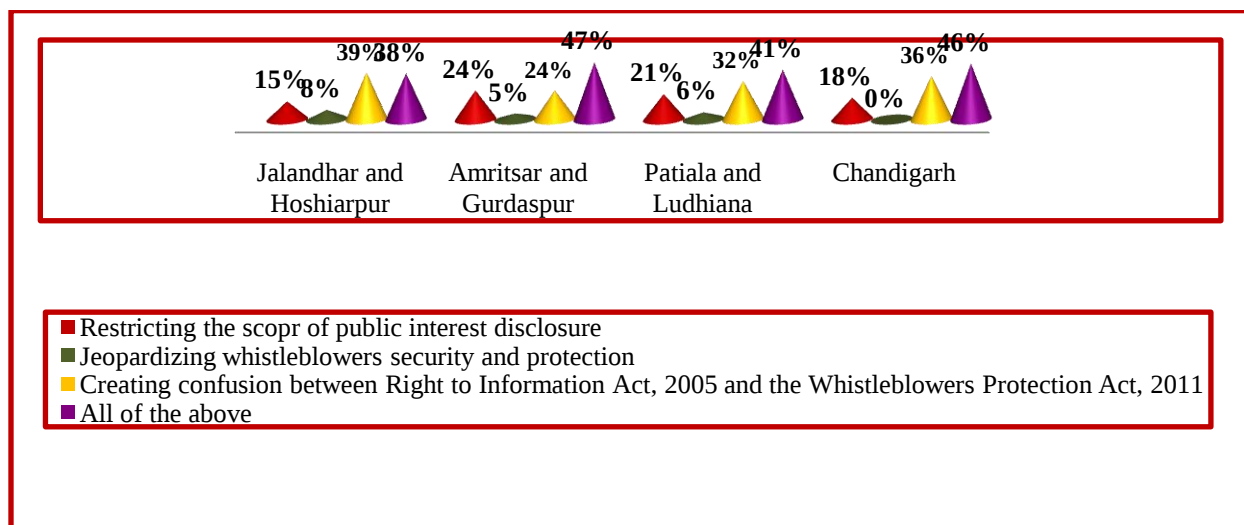
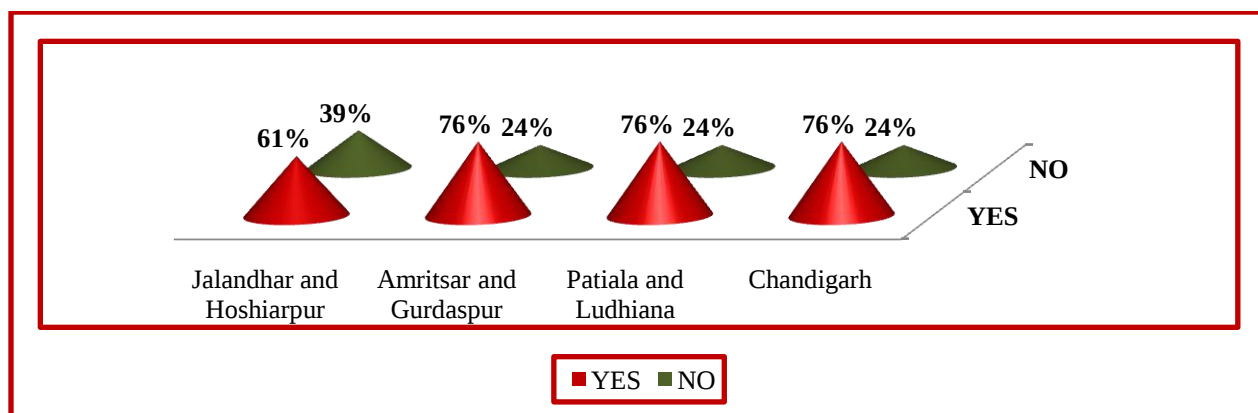


Figure No. 3 reveals that considerable majority of respondents from categories I to IV have given maximum favour to fourth option (all of the above) i.e. 38%, 47%, 41% and 46% respectively. Legal respondents consider that this Bill creating too many exceptions under which public interest disclosure cannot be made. Further, “this Bill provides that whistleblower can only disclose such information, which is accessed through the Act, 2005. This Bill also tries to jeopardize the security and protection of whistleblowers. Most importantly, this Bill creates confusion between the Act, 2005 and Act, 2011.” So far as option two ('Jeopardizing whistleblower's security and protection') respondents from all the categories have given least response i.e. 8%, 5%, 6% and 0% in its favour.

The respondents from categories I, and IV have given maximum favour to third option (creating confusion between RTI Act, 2005 and Whistleblowers Protection Act, 2011) i.e. 39% and 36% respectively rest two categories have given 24% and 32% response in favour of the said option. Further option one ('restricting the scope of public interest disclosure') has been favoured by all the categories with varying responses i.e. 15%, 24%, 21% and 18% respectively.

4. Whether this Amendment Bill, 2015 is creating a huge area of exemptions for the state authorities to stay out of reach of whistleblowers.

FIGURE: 4



The response to this question as shown in **figure No. 4** is clearing the fact that a large majority of legal respondents consider that this amendment Bill really creating a huge area of exemptions for the state authorities to stay out of reach of whistleblowers. The respondents of categories II, III and IV have given similar opinion regarding option one ('yes'). Starting from respondents from category II, 76% of them have answered positively while 24% have given negative response. Respondents from category III and IV have also given similar opinion i.e. 76% and 76% respectively in favour of option one ('yes') while 24% and 24% of them have answered negatively. Respondents from category 'I' are somehow different from the above said three categories. They have given 61% response in favour and 39% in disfavour of such question. This shows that legal respondents are fully aware about the

dilution of the Act, 2011 with the insertion of too many exemptions in the Amendment Bill, 2015.

5. **Whether the Whistleblowers Protection (Amendment) Bill 2015 completely dilutes the provisions of the Whistleblowers Protection Act, 2011 by removing everything exempted under Section 8 (1) of the RTI Act, 2005 from within the ambit of whistleblowing?**

FIGURE: 5

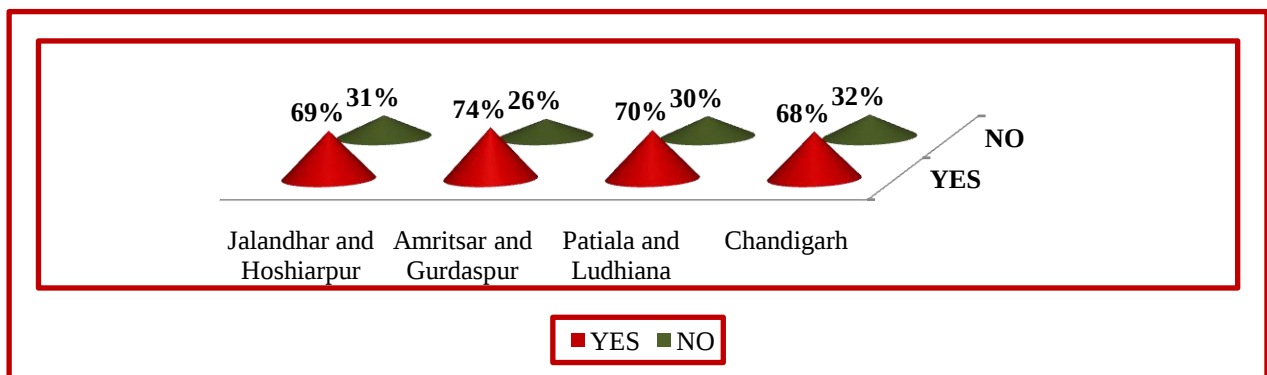
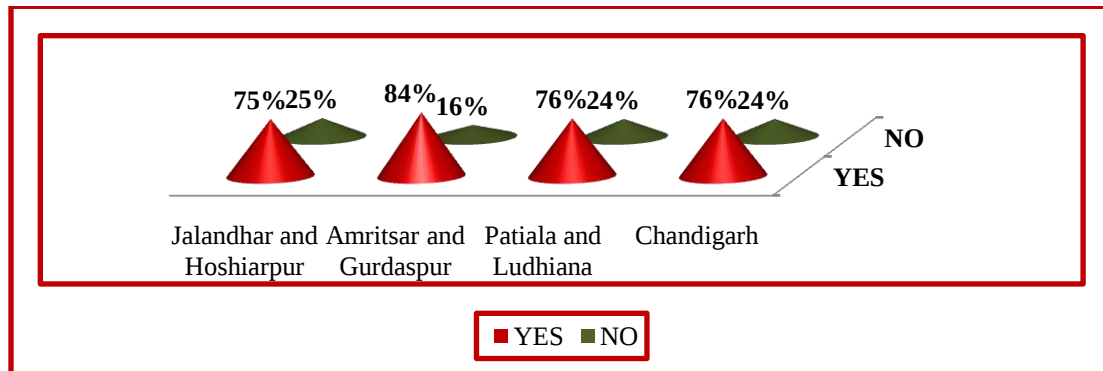


Figure No. 5 reveals that with the considerable majority category I to IV have given a positive response to option one ('yes') i.e. 69%, 74%, 70% and 68% respectively while 31%, 26%, 30% and 32% respondents from all the categories have given their response in favour of option two ('no').

6. **Though the RTI Act, 2005 is indeed a revolutionary piece of legislation designed to check corruption and promote accountability in governance, it has often been used as a tool for harassment of RTI Activists and whistleblowers. Do you think that Whistleblowers Protection Act, 2011 is more helpful in stopping the harassment of whistleblowers and RTI Activists?**

FIGURE: 6



The above shown **figure No. 6** containing the data for the above said question which is asking with a view to ascertain the opinion of legal respondents Whistleblowers Protection Act plays a crucial role in order to provide protection to the whistleblowers as well as RTI activists.

The second option i.e. 'No' has been given 25%, 16%, 24% and 24% response by respondents from category I to IV respectively. It means some of legal respondents consider that the Act, 2011 and Amendment Bill, 2015 is effective to protect the RTI activists as well as whistleblowers. But at the same time there are various loopholes in the Act of 2011 and Amendment Bill, 2015.

On the other hand from figure no. 10 it can easily be ascertained that respondents from categories I, III and IV have answered the question in affirmation with a huge majority i.e. 75%, 76% and 76% respectively while category II respondents are far ahead with 84% response to the said option.

5. Suggestions to Remove the Shortcomings of Bill, 2015

- There is need to revive the earlier provision as prescribed under section 4(1) of the Act, 2011 regarding whistleblowers are being immunised from the Act, 1923
- There is need to widen the scope of Public Interest Disclosure in order to implement this law in its true spirit .
- There must be a provision for priority of public interest over private interest for the smooth implementation of the provisions of this Amendment Bill, 2015

- There is need to rationally analyse the provisions contained under section 4(1A) (d)(e)(i)(j) of the Bill, 2015 in which it makes Right to Information is the only legitimate means to disclose the information under the Act, 2011
- There is need to revive the section 5(1) of the Act,2011 in which Competent authority have absolute power to receive complaints under this Act, 2011
- There is need to setup the mechanism of appeal within the ambit of Bill, 2015.