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A Comparative Overview of the Canadian Senate and the British House of Lords

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1. Introduction

The purpose of this overview is to highlight the role which is played by the Canadian Senate and the British House of Lords in their constitutional legal systems, and to attempt to underline what similarities or differences can be identified in relation to their composition and functions. This paper will analyse whether they have an actual representative capacity and if they are able to perform the typical functions which are normally allocated to the upper chambers, functioning as a "sober second thought" and a house of check on the majority expressed in the lower chamber, usually connected to the Cabinet. The contribution of these chambers to parliamentary systems of government will also be considered.

Bicameralism is an important legislative tradition in Western nations and it forms a relevant part of the checks and balances within a democratic government. A dual legislative system can guarantee the representation of distinct interests, both in a federal and unitary State and it can improve stability and quality assurance.[1] Second chambers can also contribute to the protection of individuals and minorities against abuse[2] and have the influential task of looking at legislative proposals with fresh eyes and underlining difficulties which have gone unnoticed in the lower chamber.[3] Attention is drawn to the delay necessary for a fresh review and to the greater opportunity that it creates for public debate.[4]

The choice of these two chambers is due to the peculiarities of their compositions, both non elective, but which have a common parliamentary tradition, despite some differences. In fact, the Canadian form

* Peer reviewed.
[1] See J. MONEY - G. TSEBELIS, *Cicero's Puzzle: Upper House power in Comparative Perspective,* in *International political Science Review*, 1992, vo.13, p. 27.
[2] See J. MADISON - A. HAMILTON - J. JAY, *The Federalist Papers*, New York, 1987, n.9.
[3] See H. EVANS - R. LAING (eds.), *Odgers' Australian Senate Practice*, Canberra, Dep. of the Senate, 2012, pp. 12 ff.
[4] See M. RUSSEL, *Reforming the House of Lords*, Oxford, 2000, pp. 21 ff.

of government is based on the Westminster model[5], but it must be noted that Canada was the first democracy to apply the Westminster parliamentary model to a federal state.[6] So, in the Canadian federation, as in other parliamentary systems, there is a fusion of powers in which the federal cabinet is chosen from the federal assembly and is accountable to it.[7]

This fact is very relevant because in a parliamentary federal system the upper chamber's role could be more limited than in a presidential federal one. Watts argued that when the legislative and executive government are separate, the two federal houses usually have equal powers, on the other hand, where there is a parliamentary system the chamber which is linked by a vote of confidence to the executive, usually the lower chamber and always of an elective character, has more power than the upper one.[8]

Also of note is the different role which may be played by a house of review based on the British model and a house of states which follows the US model. While the English bicameral system is founded on the division of the population into classes, the nobility and commoners, in the US system the bicameral system is justified on the equality in sovereignty between states.[9] This paper will analyse which model has influenced the Canadian system to a greater extent.

It must be added that the Canadian Senate is the only one in the western world whose members are all appointed[10]; furthermore, the composition and the selection of the senators are an exception in comparison to other federal practices.

In order to better understand the role and the functioning of the Canadian Senate it seems worthwhile to make some remarks on the history and evolution of this chamber. Then the paper will focus on the peculiarities of the Senate and the British House of Lords with regards to their composition and their relationship with the lower chamber and the Executive.

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[5] To examine features of the Westminster system in Canada see R.A. RHODES - J WANNA - P. WELLER, *Comparing Westminster*, Oxford, 2011. On the adherence of the Canadian system to the Westminster model see G. LEVY, *Reforming the Upper house: Lessons from Britain*, in *Constitutional Forum Constitutionnel*, 2014, pp. 27-28.

[6] See P.W. HOGG, *Constitutional Law of Canada*, Toronto, 1985, pp. 257 ff. The Author underlines how the idea of British parliamentary sovereignty remained an important influence in Canadian constitutional theory.

[7] See R. WATTS, *Comparing Federal Systems*, London, 2008, p. 137.

[8] See R. WATTS, *Bicameralism in Federal Parliamentary System*, in S. JOYAL (eds.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal, 2003, p.73.

[9] See M. RUSSEL, *Reforming*, fn. 5, p. 21. For the role US plays in Canadian constitutional discourse see *Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions,* in *Harward Law Review*, 2007, vol. 120., pp. 1936-1957.

[10]See R. JACKSON - D. JACKSON, *Politics in Canada: Culture, Institutions, Behaviour and Public Policy*, Scarborough, 1990, p. 365.

2.History and evolution of the Canadian Senate

The creation of a Parliament in Canada, composed of a lower and an upper house, dates back to 1867, when Westminster Parliament approved the Constitution Act 1867. In fact, this act stated the creation of the federation of Canada and brought together the four provinces of Ontario, Quebec, New Brunswick and Nova Scotia.[11]

As already mentioned, the new Canadian parliament was based on the Westminster model and its traditions[12], but at the same time it introduced something new: in Canada the parliamentary institutions were combined with the federal organization.

On the model of Westminster parliament, the Canadian system has checks and balances: the Cabinet, the Commons and the Senate are the three branches of power. In particular, the Senate must exercise the power to check the Cabinet and the Commons, especially when it appears that a Cabinet is attempting to use its majority in the Commons "to silence dissent of minorities".[13] The Founders believed that bicameralism was to protect democracy: the Senate was important to guarantee security for political dissent and respect for minority political rights. The Fathers of Confederation understood "minority" not as ethnic or religious minorities, but as a political minority: the political opposition. So, the Senate would have had to protect minorities and to promote deliberation.[14]

[11]On the history of the federation see P.H. RUSSEL, *Canada's Odyssey, A Country Based on Incomplete Conquests*, Toronto, 2017; R. ALBERT, D. CAMERON (eds.), *Canada in the World Comparative Perspectives on the Canadian Constitution*, Cambridge, 2017. On the Canadian federal structure see H. BAKVIS - G. SKOGSTAD, *Canadian Federalism Performance, Effectiveness, and Legitimacy,* Toronto, 2008; G. BAIER - K. BOOTHE, *What is Asimmetrical Federalism and Why Should Canadians Care?* , in T. BATEMAN (eds.), *Braving the New World: Readings in Contemporary Politics*, Toronto, 2008, pp. 206 ff.; F. PALERMO, *Divided We Stand. L'asimmetria negli ordinamenti composti*, in A. TORRE - L. VOLPE - T.E. FROSINI (eds.), *Processi di devolution e transizioni costituzionali negli Stati Unitari (dal Regno Unito all'Europa)*, Turin, 2007, pp. 149 ff.; F. ROCHER - M. SMITH, *New Trends in Canadian Federalism*, Peterborough, 2003; R. SIMEON, *Aspetti istituzionali del federalismo canadese*, in J. FRÉMONT - A. LAJOIE - G. OTIS - R.J. SHARPE - R. SIMEON - K. SWINTON - S. VOLTERRA, *L'ordinamento costituzionale del Canada*, Turin, 1997, 49 ss..

[12] See J. AJZENSTAT, *Bicameralism and Canada's Founders: The Origins of the Canadian Senate*, in S. JOYAL (eds.) *Protecting,* fn. 8. The Author remembered that J. A. MacDonald said how the government of the new federation would replicate the British system of King, Lords and Commons. The cabinet was sometimes referred to as the monarchic branch since it consisted of ministers of the Crown, the Senate was the aristocratic house and the Commons the democratic house.

[13] See J. AJZESTAT, *Bicameralism*, fn.12, pp. 3 ff.

[14]Historically, half of the provinces had upper houses, usually they were called as Legislative councils. Gradually, during the late nineteenth and early twentieth century, they were abolished. In 1968, the last upper chamber still working was abolished, it was in Quebec. See P.G. THOMAS, *Parliament and Legislature. Central to Canadian Democracy?*, in J. C. COURTNEY - D.E. SMITH (eds.), *The Oxford Handbook of Canadian Politics*, Oxford, 2010, pp. 166 ff.

The method of selection of the Senate was not by election because if it were, it would have been like a second version of the lower chamber.[15] At the Quebec Conference (1864) during the deliberations on the future Parliament the adoption of an appointed Senate was a decision to reject an elected second chamber which had existed previously under the Act of Union (1840). In fact, this chamber had caused difficulties by creating conflicting electoral mandates.[16]

The decision was made to nominate the members of the upper chamber, based on the principle of equality.[17] Appointments were and still are made formally by the Governor General, but effectively by the Prime Minister on a party political basis; in fact the Prime Minister uses his patronage to choose Senate members inside his own party. So, the Canadian Senate is not considered truly representative of federal requests, although it is an institution of a federal system. The provinces, which should have been represented by the Senate, did not have any participation in the power to appoint senators.

Senators had to be aged over 30 at the time of appointment, be resident in the province or territory for which they are appointed and own property in the amount of four thousand dollars. So, they were chosen from the wealthiest class, but it is underlined that they did not represent a class, an estate or corporate interests[18]: the Senate in Canada had to represent the regions of the federation.

From a different perspective, the Senate represents interests of the corporate class.[19] Docherty writes that the intention of the Framers was to use property qualification as part of the method of making the upper chamber a more elitist and conservatory body than the lower house.[20] However, the value of property today is irrelevant and has lost its original meaning; the sociological composition of the upper house is now similar to the Commons.[21]

[15]See R. MACGREGOR DAWSON - W.F. DAWSON, *The Government of Canada,* Toronto, 1989*,* rev. by N. Ward, p. 59.

[16] See R. WATTS, *Comparing*, fn.7, p. 11.

[17]Delegates from New Brunswick, Nova Scotia and Newfoundland were in favour of nomination by the Crown; furthermore, the nomination was considered most in accordance with the British Constitution, see MacDonald, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, Quebec, Hunter & Rose, 1865, pp. 35-36.

[18] See J. AJZESTAT, *Bicameralism*, fn.12, pp. 11 ff. Property qualification and the fact that senators were appointed for life meant that the upper chamber was really independent of the Crown and of the lower chamber. In this way, the Senate would guarantee democracy and the independence of the branches. On the economic reasons which were in support of the creation of the Canadian federation *See* T. GROPPI, *Canada*, Bologna, p. 47.

[19] See L. TRIMBLE, *Status quo Unacceptable; Senate Reform Possible; Abolition by Stealth Anti-democratic*, in *Constitutional Forum Constitutionnel*, 2015, pp. 34 ff.

[20] See D. DOCHERTY, *The Canadian Senate: Chapter of Sober Reflection or Loony Cousin Best not Talked About*, in *Journal of Legislative Studies*, 2002, p. 30.

[21] See P. PASSAGLIA, *Il Senato canadese: anomalia o originalità*, *Diritto pubblico comparato ed europeo*, 2003, pp. 1921 ff.

The British North America Act 1867 allocates seats in the upper chamber on a provincial basis, with equal numbers of seats given to the three main regions.[22] This model of a fixed number of seats, regardless of population, reflected what was adopted in the neighbouring United States.[23] It has been pointed out that these divisions over-represent the smaller provinces, but less so than in the USA. In fact, the US system allows each union state two senators regardless of population, giving less populous states a greater advantage.[24] The principle of equality was intended as regional equality and not like provincial equality, with the purpose "to protect local interests and to prevent sectional jealousies".[25] Sir J.A. MacDonald, Canada's first Prime Minister, saw the British North American colonies as three great provinces - Ontario, Quebec and the Maritimes, each with different economic interests. So, with due regard for the Quebec resolutions 1864[26], originally, three divisions were defined, assigning twenty-four senators to each one. It was decided that Ontario and Quebec would have twenty-four each, the Maritimes as the third region would also have twenty-four, ten each for Nova Scotia and New Brunswich and four for Prince Edward Island.

In fact, section 22 of the Constitution Act 1867 divides the provinces into four divisions, which are geographical entities, not regional institutions. So, subsequently, it was decided that twenty-four seats were for the Western Provinces (six for Manitoba; six for British Columbia; six for Saskatchewan; six for Alberta, six for Newfoundland and Labrador) and three for the Territories: Yukon Territory, Northwest Territories, Nunavut. The idea that the Senate represents the regional interests of Canada is contested, considering region as a geographical area which does not have interests: the Senate should exist to protect

[22]Section 22 of the Constitution Act, 1867 provides that Senators shall represent the provinces in the Parliament of Canada.

[23]It is argued that because representation is based on regional equality as opposed to individual state or provincial equality and because Canadian Senators are not elected and do not participate in ratifying executive decisions, the two chambers are quite dissimilar. About the influence of the Us system in Canadian constitutional justice cfr. P. Passaglia, Modello inglese vs. modello statunitense nell'edificazione del sistema canadese di giustizia costituzionale, available in www.giurcost.it.

[24] See J. AJZESTAT, *Bicameralism*, fn.12, p. 15. About the differences between Us federalism and the Canadian one see M.A. FIELD, *The Differing Federalisms Of Canada And The United States*, in *Law and Contemporary Problems*, 1992, 55, p. 107 ff. The Canadian Senate has also some similarities with the Australian Senate: both chambers play an important role in the protection of less populous regions, in the review of legislation. Both of them have equal legislative powers with respect to their lower houses. There are also important differences in the form of representation, method of selecting senators, and their length of tenure; A. BARNES - M. BÉDARD - C. HYSLOP - S. SPANO, *Reforming the Senate of Canada*, Publication n. 2011-83-E, Ottawa, 2011, p. 20; J. UHR, *The Australian Model Senate*, in *Canadian Parliamentary Review/Spring* 2009, pp. 26 ff.

[25]See MACDONALD, *Parliamentary Debates*, fn. 17, p. 35-36, available in www.parl.gc.ca/About/Senate/LegisFocus/legislative-e.htm.

[26]The Quebec resolution 1864 decided that the Parliament for the Federated Provinces was composed of a Legislative Council and a House of Commons.

the local and regional interests of the *provinces* within the federal legislative framework.[27] The choice of this kind of representative system is justified because of the demographic diversity of the territories and, furthermore, in light of the necessity to grant to the francophone community a proportionally higher weight than its numerical strength.[28]

The Senate was originally composed of 72 members, but increased as the country geographically and demographically grew in size. Nowadays, there are 105 senators. At the London Conference of 1866-1867, it was set up so that the number of senators would be able to increase. A formula was devised to ensure that the additional appointments would not disrupt the regional representation in the upper house. The result was section 26 of the British North America act 1867 which allows the appointment of three or six additional senators, which became four or eight with the British North America Act, 1915.[29]

Originally senators were appointed for life; in 1965, the Constitution Act 1867 was amended and it was established that all senators appointed after that date were to retire at the age of 75. This peculiarity combined with a fixed size for the Senate means that now appointments are only made when vacancies arise because of retirement, resignation or death.

The Senate had two main tasks: to exercise the power to check the Cabinet and the Commons and to represent the regions of the Canadian federation. These two functions were basically performed through the review of legislation. During the twentieth century, the Senate added two distinctive functions: the first is to provide representation and protection for minorities and other special interests; secondly, since 1960, the Senate has developed an explicit oversight role that involves a significant amount of time spent in committees conducting investigations of public policy and its administration.[30]

Through its system of standing and special committees the Senate undertakes reviews of existing policies and programs and senators stay around to lobby government for the adoption of their recommendations.[31]

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[27] See V. POULITO, *Revisit the Senate as It Was Meant to Be – The Upper House Was Created to Protect Provincial Interests in the Federal Legislative Process*, in *Constitutional Forum Constitutionnel*, 2015, vol. 24, p.15.

[28] See P. PASSAGLIA, *Il Senato,* fn.21, p. 1915.

[29] See J. AJZESTAT, *Bicameralism,* fn.12, p. 14.

[30] See P. G. THOMAS, *Parliament*, fn.14, p. 167. The Author recognizes four roles of the Senate: a revising legislative role; an investigative role; a regional representative role and a protector of linguistic and other minorities role: these are roles that the Senate has historically played. See also A. MASTROMARINO, *Un senato per le società distinte del Canada*, in E. CECCHERINI (eds.), *A trent'anni dalla Patriation canadese. Riflessioni della dottrina italiana*, Genova, 2013, pp. 98 ff.; G. MARTINICO, *La genesi "mista" dell'asimmetria candese*, in G. DELLEDONNE - G. MARTINICO - L. PIERDOMINICI (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa, 2017, pp. 15 ff.

[31] See P.G. THOMAS, *Parliament,* fn.14, p. 168.

Although neither the Canadian Senate nor the British House of Lords are elective, there are some differences with regard to their composition, their functions in legislative power, in the relationship with the executive and in their power to investigate.

3. A comparative analysis with the House of Lords: selection and composition of upper House's members

The composition of the Canadian Senate and the British House of Lords has often been defined as controversial and problematic.[32] As already mentioned, neither of these chambers are elective, unlike the lower chambers, which are directly elected.

Sartori has specified that a second chamber will be most effective if it has a dissimilar composition to the first chamber, but similar powers.[33] This could be the parliamentary experience in the United Kingdom and in Canada, where the upper and the lower chambers have similar powers, but a different composition. Moreover, Lijphart has pointed out that the method of selection is also important, affirming that the House of Lords and the Canadian Senate pose some problem because they lack democratic legitimacy, being not elected houses.[34] So, it could be interesting to try to identify the consequences that this non-elective nature has on the representativeness of these chambers.

Historically the House of Lords was a hereditary and aristocratic institution but it has changed its composition over the centuries. In fact, while at the end of the nineteenth century the House was predominantly a landowning and aristocratic assembly[35], with the Life Peerages Act 1958 and the Peerages Act 1963 the category of the life peers was introduced, in order to balance the presence of hereditary nobility. Over time there was an increase of new peerages, who are granted by the Crown, on the recommendation of the Prime Minister.[36] Consequently, there were a diversity of occupational

[32]See D. OLIVER, *The modernization of the United Kingdom Parliament*, in J. JOWELL - D. OLIBER (eds.), *The Changing Constitution*, Oxford, 2007, p. 161. See also D.E. SMITH, *The Canadian Senate in Bicameral Perspective*, Toronto, 2003, p. 43.

[33]See M. RUSSEL, *Reforming*, fn.5, p. 41.

[34]See M. RUSSEL, *Reforming*, fn.5, p. 41.

[35]See R. WALTERS, *The House of Lords*, in V. BOGDANOR (eds.), *The British Constitution in the Twentieth Century*, Oxford, pp. 197 ff.

[36]An important act has been the Life Peerages Act 1958 and then the Peerages Act 1963. The composition of the House of Lords did not change with the Parliament Act, 1911 or with the Parliament Act, 1949. Mainly, hereditary peers were conservators; political patronage has been more utilized by the Labour party, when they won the majority in the Commons in 1964. Up until 1999 the category of hereditary peers was the most numerous. See F. PALERMO - M. NICOLINI, *Il bicameralismo*. Pluralismo e limiti della rappresentanza in prospettiva comparata, Naples, 2013, p. 102. See also M. RUSSEL - M. SCIARA, *Parliament: The House of Lords – Negotiating a Stronger Second Chamber*, in M. RUSH - M. GIDDINGS (eds), *The Palgrave Review of British Politics*, New York, 2007, pp. 119 ff.; P. DOREY - A. KELSO, *House of Lords Reform Since 1911: Must the Lords Go?,* New York, 2011.

backgrounds: the new members came from the public services and professions and, also, from industry, commerce and finance.[37]

Since the 1999 reform, there has been a transformation of the upper chamber's representativeness: the British House of Lords is composed of hereditary peers, significantly fewer than in the past, which paradoxically are the sole elective component of the House.[38] They are now less in number than the life peers, nominated by the Crown on the advice of the Prime Minister, and there is no automaticity in the power to seat and to vote in the House of Lords on the basis of a hereditary title.[39]

The other members of the upper chamber are, in addition to being appointed life peers, archbishops and bishops of the Church of England, who sit as Lords Spiritual until retirement. There were also Judicial peers who have now been transferred by the Constitutional Reform Act 2005 to the Supreme Court.

Therefore, the House of Lords Act 1999 and the Constitutional Reform Act 2005 have caused amendments in the House of Lords' composition, but they did not change its legitimation.

The House of Lords is often defined as a chamber of experts. Members of this chamber are generally appointed at the end of their careers[40], as they have gained from their past experiences; moreover, continuity in membership is considered useful because it helps to build relationships in the house[41] and to create a collaborative culture. Prestige and qualification in the designated subjects as life peers and their different social and political classes lead as a definition of the House of Lords as a body which represents pluralist interests.

Differently from the British experience, scholars have underlined the fact that in Canada the hereditary title would not be a suitable choice. On the one hand there was no aristocratic class which asked to be represented and on the other hand there were equalitarian conditions which were prevalent in North America.[42]

In support of this, senators must reside in the area of the country which they represent, nevertheless appointments are made centrally without reference to institutions in the provinces. In fact, senators have no real links with institutions at the provincial level and there is no input regarding appointments from

[37]See R. WALTERS, *The House of Lords*, fn. 36, pp. 205 ff.
[38]See A. Torre, *In Praise of the House of Lords. Riflessioni sulle prospettive di riforma della seconda Camera britannica*, in C. DECARO (eds.), *Il bicameralismo in discussione: Regno Unito, Francia, Italia. Profili comparati*, Bologna, 2008, pp. 45 ff.
[39]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37, p.* 85.
[40]See M. RUSSEL, *Reforming,* fn. 5, p. 43.
[41]See M. RUSSEL, *Reforming*, fn.5, p. 297
[42]See J. AJZESTAT, *Bicameralism*, fn.12, p. 5.

the provinces.[43] So, The Senate is not considered as a federal chamber because it is not representative of the provinces.[44]

It is argued that the lack of federal representativeness does not depend on the criteria for the senators' appointment, but rather on the political responsibility that senators have with regard to the people of the provinces.[45] Doria underlines that senators who are appointed by the Prime Minister could have been linked to provinces by political representation, even though they were not elected, if the Prime Minister was accountable to the provinces, considering the accountability's transferring character. However, the Prime Minister's accountability is not to the provinces but to the whole community, a political representation between senators and provinces is excluded.[46]

Regarding this, Pouliot says that the 14th Resolution of the 1864 Quebec Conference, which stated that the Crown shall appoint the members of the upper house "so that all political parties may as nearly as possible be fairly represented", meant necessity for the proportional representation of all provincial political parties in the Senate. He points to the idea that the Senate should reflect the local interests of the people, as expressed in their provincial parliaments, while appointments made by the Prime Minister are without the authority to represent and protect the interests of the provinces.

It also has been said that this method for the selection of senators would prove the influence of the English parliamentary tradition of bicameralism. Hicks affirms that the appointed Senate was more compatible with the Westminster model because appointed senators would defer to the elected members of the lower chamber: so, limitation of the powers of the Senate was appropriate to preserve the Westminster model.[47] The Senate was considered within the form of government rather than an institution of balance within the form of state.[48] For this reason, the Senate has not been a federal chamber

[43]See M. RUSSEL, *Reforming*, fn.5, p. 221.

[44]See G. DORIA, *In cerca di una normalizzazione. Il Senato canadese alla luce dei modelli comparati del bicameralismo*, in *Federalismi.it*, p. 22. The Author makes a distinction between federal states in which there is a political representation of members' states, such as the US Senate, the Council of States in Switzerland or the Austriac Bundesrat. In these cases, senators are free in expressing their will and represent only their own community. Instead, in the German Bundestrat there is juridical representation: the senators' will is made up externally, they are subject to recall and vote collectively.

[45]See R.L. WATTS, *Federal Second Chambers Compared*, in J. SMITH (eds.) *The Democratic Dilemma: Reforming The Canadian Senate,* Montreal, 2009, pp.35-38. G. DORIA, *In cerca di una normalizzazione*, fn. 45, p. 24. Federal government does not have any responsibility to create a political representation in respect to the provinces separately configured, but it has a relationship only with the national community.

[46]See G. DORIA, *In cerca di una normalizzazione*, fn. 45, p. 24. It is emphasised that we would have a political representation if there is an accountability relationship between the institution and the people. The Author cites G. SARTORI, *Elementi di teoria politica*, Bologna, pp. 226 ff. Differently, it is argued that the Senate is not responsible to the people or to interests outside Parliament; it is responsible to Parliament, making laws together with the lower chamber; see D.E. SMITH, *The Canadian Senate*, fn.33, p. 55.

[47]See B.M. HICKS, *Placing Future Senate Reform in Context*, in *Constitutional Forum Constitutionnel*, 2015, vol 24, 2, p.18.

[48]See P. PASSAGLIA, *Il Senato*, fn.21, p. 1917.

but it is a chamber of regional interests both in a cultural and in a socio-economic sense, which result from the aggregation of the provinces. [49]

According to a different thesis, the method of selection and the criteria for the allocation of seats are justified by cleavages which are typical of Canadian federalism. They concern both the issue of linguistic affiliation and territorial membership.[50]

Instead, the Canadian Supreme Court has supported the federal character of the Senate. It has argued that the Senate joined English bicameralism with the federal principle: the upper chamber must intervene in the legislative function but it must also consider and protect provincial interests.[51]

Differently, the House of Lords does not represent regions or territorial units of the country. Establishment of a territorial chamber could link the reform of the House of Lords to the unfolding devolution settlement.[52]

In both houses there is a political patronage: members of the Canadian Senate are appointed by the Governor General; by convention it means by the Cabinet.[53] In the United Kingdom a large number of peers are appointed by the Crown, but really by the Prime Minister.

Patronage is disapproved by some British scholars, because it is not subject to any legal regulation and because there is no regulation in the ways in which the parties select members. The Prime Minister decides how many peers should be appointed and how many members each party should have. Consequently, the party balance depends on the head of the government.[54] In this sense, constitutional conventions allow to nominate life peers in order to reflect the political composition of the Commons.[55]

Otherwise, in Canada, the Prime Minister cannot decide the number of senators which should be appointed because this number is fixed, while the size of the House of Lords is flexible.

This kind of party balance influences the character of the houses.[56] In the House of Lords there are many crossbench members.[57] They do not reflect political cleavages, because they are out of the parties' dynamics. They are often the most expert and their presence enriches the representative of pluralism. In 2000, the House of Lords set up an Appointment Commission which had to indicate to the Crown the

[49]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn.37, p. 1*38. It is considered that appointments in the Senate are used to give not only provincial representation, but also representation to economic, racial, religious groups; see R. MACGREGOR DAWSON - W.F. DAWSON, *The Government of Canada* fn.15, p. 286.
[50]See G. DORIA, *In cerca di una normalizzazione*, fn.45, p.39.
[51]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn.37, p.1*39.
[52]See M. RUSSEL, *Reforming*, fn.5, p. 308
[53]See P.W. HOGG, *Constitutional Law of Canada*., fn.6, p. 200.
[54]See D. OLIVER, *The modernization*, fn.33, p.174.
[55]See F. PALERMO - M. Nicolini, *Il bicameralismo, fn. 37, p.*227.
[56]See M. RUSSEL, *Reforming*, fn.5, p. 298.
[57]See M. RUSSELL – M. SCIARA, *Independent Parliamentarians En Masse: The Changing Nature and Role of the 'Crossbenchers' in the House of Lords*, in *Parliamentary Affairs*, vol. 62, 1, 2009, pp. 32–52.

candidature of life peers. It had to base its decision more on professional competence than political allegiance. So, these members are representative of a variety of interests and instances.[58] In that way not only are there political mechanisms of selection available but also the competence of the life peers is better valued.[59]

In Canada, the Senate is filled with faithful party activists[60] and there is no tradition of Prime Ministers making appointments to the Senate from outside their own party. Senators are usually politicians who have served the party.[61]

In these two countries, there are some factors relating to the composition of the houses which may encourage its members to express more independent views. There is a rolling membership and long term office: memberships change gradually and serve long terms of office. Moreover, the government cannot dissolve the house and, in addition, there is not the problem of reselection by their party after they enter the house, because members are at the end of their carriers and usually do not look for another kind of political task. Despite this, notwithstanding Canadian senators being older than members of the Commons because they usually have more parliamentary experience before taking their seats, it is considered that they did not add any lustre to the Senate.[62] Russel argues that this demonstrates that the inclusion of expert members in an upper house can be as much a product of tradition as a result of the method of composition.[63]

So how has party balance worked in these two upper houses, which are partially and wholly appointed? It could be said that the House of Lords has been dominated by the opposition during all periods of Labour government. Also in Canada there have been times when oppositions have controlled the Senate. The appointed Canadian Senate has also tended to show restraint when the opposition was in control, despite its formal powers.[64] The possibility that the government has the majority in the upper house is more difficult in Canada because the numbers of members are fixed and the term of the office is long, when senators are 75 years old. So, it happens that the government changes but the composition of the upper house does not. In fact, the Senate has not always been affected by the government; it is argued

[58]See M. RUSSEL, *Reforming,* fn.5, p. 74. F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37, p.* 86.
[59]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37, p.*104. See also House of Lords Appointment Commission, online http://lordsappointments.independent.gov.uk/news.aspx.
[60]See M. RUSSEL, *Reforming,* fn.5, p. 306.
[61] See G. DORIA*, In cerca di una normalizzazione*, fn.45, p. 8; M. FOUCAULT - E. MONTPETIT, *Policy Attention in Canada. Evidence from Speeches from the Throne*, in C. GREEN-PEDERSEN, S. WALGRAVE (eds.), *Agenda Setting, Policies, and political systems: a Comparative Approach,* Chicago, 2014, pp. 220 ff.
[62]See R. MACGREGOR DAWSON, W.F. DAWSON, *The Government of Canada* , fn. 15, p.61.
[63]See M. RUSSEL, *Reforming*, fn.5, p. 306.
[64]See M. RUSSEL, *Reforming*, fn.5, p. 299.

that the history of the Senate could be divided into three stages which are characterised by a different degree of autonomy in relation to the executive.[65]

In fact, in the long term it is not obvious that the government appointment is equivalent to a government's influence. The Upper chamber could be appointed by a government which has a specific political colour: in this case the Senate will be a body subject to the government's influence. When there is a new government which expresses a different party, the upper chamber will assume an anti-governmental behaviour. Moreover, the long time and the fixed number of senators does not facilitate a fast change of the Senate's composition. Doria says that the Senate could be defined as a government chamber, but not as a chamber to each government.[66]

Instead, in the United Kingdom the absence of a fixed number of the members of the House of Lords enables every majority to appoint new members, changing the balance in their favour. Differently, in Canada the fixed composition of the Senate may be waived only by adding eight senators. Only once has the Prime Minister used that possibility[67]. This characteristic gives a bigger autonomy to the Canadian Senate which cannot simply grow unchecked.

In conclusion, we can observe that the reform of the House of Lords has modified this chamber from a class based interest to an institution called upon to interpret people's will, functioning for the representation and the participation of pluralism in political and legal procedures. It is helped by the high professional qualification of its members and the lack of any direct accountability versus other constitutional bodies. Life peers appointments should express the plurality of interests.[68]

Instead, in Canada, there has been a softening of the British model and appointments are more influenced by the relationship between the government and the lower chamber. Consequently, the Senate's composition has an attitude to reflect cleavages of general political representation[69], although the senators' limited opportunities to be in cabinet contribute to an independence of mind not found in the Commons.[70]

4.Bicameralism and participation in the legislative process

From a comparative perspective, we can observe that usually the two chambers of Parliament have different powers. The main difference is in the *iter legis*: generally the upper house has less power than the

[65]See G. DORIA, *In cerca di una normalizzazione*, fn.45, p. 9.
[66]See G. DORIA, *In cerca di una normalizzazione*, fn. 45, p. 12.
[67]See G. DORIA, *In cerca di una normalizzazione*, fn. 45, p.11.
[68]See F. PALERMO, M. NICOLINI, *Il bicameralismo, fn. 37, p.1*04
[69]See F. PALERMO, M. NICOLINI, *Il bicameralismo, fn. 37, pp.*87 ff.
[70]See P. G. THOMAS, *Parliament*, fn.14, p. 168.

lower, having attributed a veto power or the power to delay legislation. Moreover, where the government is subject to a vote of confidence, this vote is applied only in the lower house.

In that respect, Canadian and British Parliaments do not constitute an exception: the vote of confidence is not with the upper chambers.

Formally, legislative powers of the Senate and the House of Lords are equal to those of the lower chambers.[71] There are minor differences between the upper chamber and the lower in the approval of financial legislation and in the constitutional amendments for the Canadian Senate.[72] Moreover, both chambers have a deliberative role, completing the work of the Commons.[73]

We can observe that British parliamentary tradition has influenced the legislative process in Canada. With respect to ordinary legislation, both in the United Kingdom and in Canada, bills can be introduced in either house. They must pass both houses, and then receive royal assent respectively from the Crown and the Governor General. Passage through each chamber is similar: a bill is introduced in plenary, with a first and second reading, then considered in committee where the bill is examined in detail. After this, the bill returns to plenary, with a third reading and it is voted on. The process is the same in the upper house. In the House of Lords the committee stage is generally taken on the floor of the House.[74]

Both Houses of the Canadian and British Parliament have a set of committees which consider legislation in detail. Both Canadian and British upper houses can amend or reject any legislation.[75]

Moreover, in the British legal system by convention the House of Lords does not reject legislation implementing government's manifesto commitments. The foundation of that convention is based on the respect of the wish of the electors. Even if electors are not represented by Lords, their choice must be respected by them. Furthermore, that convention implements the domination of the party system and the crisis of the prohibition of mandate: the policy guidelines that are enunciated in the electoral

[71]Macdonald, Canada's first Prime Minister, stated that the Senate was to be a chamber of "sober second thought", emphasising independence and scrutinising the role of the Senate: "[The Senate] must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people", in Senate of Canada, 'The Senate Today: Quotable Quotes', accessed 11 August 2016.

[72]See M. RUSSEL, *Reforming*, fn.5, p. 33.

[73]See D.E. SMITH, *The Canadian Senate*, fn.33, p. 49.

[74]See M. RUSSEL, *Reforming*, fn.5, pp. 26 ff.; G. RENNA, *Regno Unito*, in R. DICKMANN – A. RINELLA (eds.), *Il processo legislativo negli ordinamenti costituzionali contemporanei*, Rome, pp. 252 ff; F. ROSA, *Canada*, in R. DICKMANN – A. RINELLA, Ibidem, pp. 486 ff.

[75]See S. JOYAL, *The Federal Principle*, in S. Joyal (eds.), *Protecting,* fn. 8, p. 258, about the definition and the importance of the veto power and the difference between it and suspensive power. The Author underlines that if the the veto power could be abolished it would mean removing also the power "to study, delay, negotiate, amend and refuse" and consequently it would mean the recognition of an all powerful House of Commons and an omnipotent executive government, p. 303.

manifesto have been processed in the orientations of the government's policy making. During legislature, political leadership shall be required to answer to people on what was indicated in the manifesto.[76]

A significant difference between these two legislative processes is that in the Canadian Senate there are no means of resolving disputes between the two Houses: bills can shuttle indefinitely. Consequently, if the Senate refuses several times to agree a bill approved by the House of Commons, this chamber does not have the power to overcome senators' decision. Government might only try to force passage appointing additional senators, but we have seen that this power has been used only once, in 1990 when Prime Minister Mulroney appointed new senators to achieve a majority so that they could positively contribute in the vote and push through a bill that introduced a Goods and Services Tax.

In the United Kingdom, the lower house can override the veto of the upper house one year after a bill's introduction, if it is reintroduced in a new parliamentary session.[77] It is argued that the introduction of the suspensive veto of the House of Lords corrected the role of the upper house, when the Commons came to represent the popular will through mass parties.[78] Walters highlights that the House of Lords began its activity as a chamber of veto, but it evolved into a chamber of legislature where legislative scrutiny became the real role of the chamber.[79]

The Canadian Senate is not subject to constitutional provisions as the Parliament Acts of 1911 and 1949 which restrict the power of the House of Lords regarding the length of time it can delay legislation.

In both legal systems, financial legislation must be introduced in the lower chamber. In Britain bills classified money bills must be introduced in the lower house. The House of Lords can only delay for one month[80].

Driedger says that the best argument in favour of the House of Commons can be found in the principle that there would not be taxation without representation: only the lower chamber is elective, so it can have stronger power than the upper chamber to grant funds or to impose taxes. [81]

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[76]See A. TORRE, *In Praise of the House of Lords*, fn. 39, p. 54. In the Canadian context there is no similar convention, cfr. P. Thomas, *Comparing the Lawmaking Roles of the Senate and the House of Commons*, in S. JOYAL (eds.), *Protecting.,* fn. 8, p. 199. It has been suggested that a political convention in favour of a subordinate role of the Senate exists; Thomas suggests four different situations in which the Senate might invoke its veto, p. 198.

[77]Parliament Act 1911 removes from the Lords the power to approve money bills and delimit the power to refuse bills approved by commons for three years. It places the ultimate power of decision making in the House of Commons. Parliament Act 1949 limited the House of Lords' delaying power over non-financial legislation from three years to one. See P. NORTON, *Parliament Act 1911 in its Historical Context*, in D. FELDMAN, (eds.), *Law in Politics, Politics in Law*, Oxford, 2013, pp. 155 ff.; C. BALLINGER, *The Parliament Act 1949*, in D. FELDMAN, (eds.), *Ibidem*, pp. 171 ff.

[78]See D.E. SMITH, *The Canadian Senate*, fn. 33, p. 45.

[79]See R. WALTERS, *The House of Lords*, fn.36, p. 212.

[80]See M. RUSSEL, *Reforming*, fn.5, pp. 33 ff.

[81]See E.A. DRIEDGER, *Money Bills and the Senate*, *Ottawa Law Review*, 1968, vol. 3, n.1, pp. 40-41, citated also in www.parl.gc.ca, May 2001.

By Section 53 of the Constitution Act, 1867 money bills are to originate in the House of Commons[82]. Otherwise, Driedger notes that the limitation in the power of the Senate to increase costs is not to be found in section 53 neither in section 54 which deals only with appropriate bills imposing a tax or impost. The first section gives only the right to initiate and not the right to amend; section 54 does not mention the Senate or taxations bills, it does not impose any restriction with respect to the imposition of taxation[83]. So, he believes that the Senate's interpretation about the prohibition to increase money bills cannot be found in its foundation in those sections.

The justification for this limit could be in the Ross Report drafted by the Special Committee Appointed to Determine the Rights of the Senate in Matters of Financial Legislation in which it is affirmed that the Senate has the power to amend bills originating in the Commons, but does not have the right to increase costs.[84] However, the Senate can reject such bills.

Moreover, in the Canadian legal system conventions have restricted the upper chamber's role in approving financial legislation: the Senate can refuse money bills, but "the fact that it is not a directly elected body has underscored the firm convention that the power will not be exercised".[85]

With regard to the constitutional amendments, it is known that the United Kingdom does not have a written Constitution and there are no special conditions to pass constitutional bills. The House of Lords does not have more power over these bills.[86] Constitutional amendments are treated as ordinary legislation. There are exceptions in connection with bills that extend the life of a parliament and delegated legislation; these acts are subject to an absolute veto by the House of Lords.[87]

In Canada, by section 47(1) of the Constitution Act, 1982 it is provided that an amendment made under section 38, 41, 42 or 43 may be made without a resolution of the Senate; in these cases the Senate has

[82]Section 53 of the Constitution Act, 1867 states that "Bills for appropriating any Part of the Public Revenue, or for Imposing any Tax or Impost shall originate in the House of Commons".

[83]See E.A. DRIEDGER, *Money Bills,* fn.82, p. 42.

[84]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37*.

[85]See N. ARONEY, *The Constitution of a Federal Commonwealth. The Making and Meaning of the Australian Constitution*, Cambridge, 2009, p. 50, nt. 2; F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37, p.1*3. Upon the Senate's vigilant role on the budgetary matters see P. HARDER, *Complementarity: The Constitutional Role of the Senate of Canada*, available in https://senate-gro.ca/wp-content/uploads/2018/04/Complementarity-The-Senates-Constitutional-Role-2018-04-12-Final_E.pdf

[86]See M. RUSSEL, *Reforming*, fn.5, p. 180.

[87]See M. RUSSEL, *Reforming*, fn.5, p. 138. We can also observe a major role of the House of Lords on the approval of delegated legislation: the upper chamber spends more time than the Commons debating delegated legislation, M. RUSSEL, *Reforming*, fn.5, p.147. Upon the conventional power of the House of Lords on the delegated legislation see N. PALAZZO, *Pubblicata la Strathclyde Review: verso un ridimensionamento del potere dei Lord?,* in www.DPCEonline.it , 2016, 2.

only the power to delay for a maximum of six months.[88] Therefore, if Parliament is competent to proceed under section 44, without provincial consensus, the consent of the Senate is always required.

Moreover, the Senate cannot have a veto over constitutional amendments involving provincial legislation.[89] The justification of that is found in the direct approval of the provincial assemblies which is expressly required. This seems to confirm that the Senate is not considered as an effective territorial chamber.

5. Relation to the Executive and the Powers of investigation

Both in Britain and in Canada, upper houses do not have the power to appoint or to remove government, because the government has confidence only with the lower elective chamber.

However upper houses can have an important role in the revision of legislation, in delaying legislation, in scrutiny, in the grant of delegated powers, in debating matters of public importance.[90]

Even if there is no confidence, members of the upper houses can be part of the government as ministers, but in both parliament systems few members of the upper houses sit in Cabinet.

In Britain, conventionally, ministers must sit in Parliament and, in the modern cabinets, two members of the House of Lords become ministers, usually as leader of the House and as Lord Chancellor. The role of Lords in post World War Cabinets declined and it became unusual to nominate as ministers members of the upper house.[91] Often some junior ministers are from the House of Lords.

[88]The general procedure to amend the Constitution is set up in section 38 of the Constitution Act 1982, which requires the approval of at least two thirds of the provinces having at least 50% of the total provincial population (the "7/50" procedure), the approval of the House of Commons and the Senate (although the Senate's approval can be dispensed with after six months if the House of Commons reaffirms its approval), the approval of a majority of the total number of members in each legislature, rather than a simple majority of the members present at the vote, for any amendment reducing provincial powers or rights and can be opted out of by a province if the amendment reduces provincial powers or rights, provided a majority of the total number of members in the legislature pass a resolution of dissent. Other procedures for amending the Constitution are set out in sections 41, 42, 43, 44 and 45 of the *Constitution Act, 1982*. They include amendment by unanimous consent for some matters particularly crucial to Canada's federal principles; amendment of provisions relating to some but not all provinces; amendments by Parliament alone that relate to the executive government of Canada or the Senate and the House of Commons; and amendments by a province alone to the constitution of the province. A. BARNES - M. BÉDARD - C. HYSLOP - S. SPANO, *Reforming*., fn. 24, p. 5; R. ALBERT, *The Difficulty of Constitutional Amendment in Canada*, in *Alberta Law Review,* 2015, 39, pp. 85 ff; P.W. HOGG, *Formal Amendment of the Constitution of Canada*, in *Law and Contemporary Problems*, 1992, pp. 253 ff.

[89]Section 45, Constitution Act 1892; P. THOMAS, *Comparing*, fn.77, p. 198.

[90]See D. OLIVER, *The modernization*, fn.33, p.164.

[91]See R. WALTERS, *The House of Lords*, fn. 36. p. 195.

Also in Canada, ministers must be parliamentarians and they can be drawn from the Senate, but usually only house leaders sit in cabinet. In the past, sometimes, senators were chosen to balance the cabinet geographically, but this has not happened for a long time now.[92]

It is possible to observe the influence of the upper houses on the government by also considering the power of these chambers to pose questions to ministers and to receive responses.

In Britain, government ministers can answer questions only in the house where they are members. Instead, in Canada ministers can speak in both houses; while in the lower house question time is daily, in the Senate it is weekly.[93]

The kind of influence of the upper house depends also on the capacity of the chamber to intervene in the process of the approval of government legislation: the power of the Canadian Senate to reject legislation and to block, in this way, the approval of the bill, shows a different way in which it is possible to measure the capacity to influence government activity, notwithstanding the absence of formal power to dismiss the government. After the election of the Conservative government in 1984 Liberal senators did not pass some bills whetting the contrast with the majority of the House of Commons.[94] This, however, is an exception in the Canadian system because the lack of legitimacy does not enable it to use its power against the elected chamber.

Second chambers have an important role in the work of parliaments' committees.[95] Investigation scrutiny is made by committees which prepare reports and contribute to the development of public opinion on major issues.[96] Reports from committees have four potential audiences in the members of the legislature, the government, the organizations outside the government and the media[97]. The way of functioning of the committees constitutes a discursive accountability and represents a great opportunity to enforce it. The Committees of the House of Lords investigate public policy and can elaborate reports that are debated in the House of Lords. They can also provoke discussions outside the Parliament and make recommendations to the government.[98]

[92]See P. MALCOLMSON, R. MEYERS, *The Canadian Regime. An Introduction to Parliamentary Government*, Toronto, 2016, pp. 37 ff.
[93]See M. RUSSEL, *Reforming*, fn.5, pp.196 ff.
[94]See M. RUSSEL, *Reforming*, fn.5, p. 153.
[95]See M. RUSSEL, *Reforming*, fn.5, p. 165.
[96]See R. WALTERS, *The House of Lords*, fn.36, p. 223.
[97]See P.G. THOMAS, *Parliament*, fn.14, p.166.
[98]We can remember the House of Lords Constitution Committee constituted in 2001or the House of Lords' European Union Committee, the Delegated Powers and Regulatory Reform Committee.

There is the possibility to constitute joint committees, involving members of both chambers. They are more frequently constituted in Canada, while in Britain they work especially in the matter of reforms.[99] We can note the role of the joint committee on Human Rights established in 2001, established by the House of Lords, with the responsibility of scrutinizing legislation for compatibility with the Human Rights Act 1998 and the European Convention on Human Rights.

Moreover, in both systems committees consider delegated legislation.

In Canada, committees play a relevant role in the Senate's work, according to their competence. We can find Standing committees, corresponding to the different areas of public policies, and Special committees, which are temporary and are established to solve difficulties regarding public policies and to evaluate the priority of the public measures.

Kunz recognises three principal roles for the Senate's committees: to legislate, to scrutinise public accounts and to inquire.[100] In the legislative process, committees can conduct public hearings to collect information and documentations about topics covered by bills, they can also involve minorities. Moreover, they can examine in detail draft bills and can value them; they can amend them and can prepare a report to the Senate with observations on the amendments.

The investigative role is very important; Senate's committees are a forum on important issues.[101] The investigation committees can conduct inquiries on topical subjects of social and economic interest. Specifically, a permanent committee is the National Finance Committee which carries out a preventive valuation on the draft bills of expense of the Government. It can investigate and carry out independent analyses and draw up reports[102]. Committees can also make recommendations for government action and can develop awareness of an issue.[103] Investigation studies by the committees can be a source of public policy.[104]

6. Conclusion

It has been observed how the Canadian Senate has looked at the British experience and how it has influenced the characteristic of the Senate, its relationship with the lower chamber and with the executive

[99]During the beginning of the last century there were many joint committees on colonial matters: there were also joint committees on the reform that carries on the Peerage Act 1967 and on the censorship of the theatre, implemented in the Theatres Act, 1968. In the House of Lords' committees see R. WALTERS, *The House of Lords*, fn. 36, pp. 223 ff.

[100]See F.A KUNZ, *The Modern Senate of Canada. A Re-appraisal, 1925-1963*, Toronto, 1965, pp. 257 ff.

[101]See B. O'NEAL, *Senate committees. Role and Effectiveness*, BP-361 E, 1994 available in publications.gc.ca

[102]Dossier Italian Senate, *Le Camere alte nei paesi extra-europei*, 2014, p. 53 and p.118.

[103]See F.A.KUNZ, *The Modern Senate*, fn.100, p. 263.

[104]See D.E. SMITH, *The Canadian Senate*, above n. 33, p. 50.

as well as in the selection of the members. The Westminster model has had a greater influence than the US system. The adaptability of a model depends on different factors, historical and cultural. For this reason, the Westminster model has not been able to fit perfectly into an inter-institutional relationship in Canada which should represent the pluralism expressed by society.[105]

There are also significant differences between the Canadian Senate and the House of Lords. A relevant distinction between these two chambers is that the Canadian Senate keeps the power to amend and to veto, while the House of Lords, after the Parliament Act 1911 and 1949 has only a suspensive veto.[106] Moreover, Senate seats are apportioned on a regional basis and the amount of memberships of the two chambers is different, as the House of Lords does not have an upper limit on members.[107]

Many proposals for reforms have been advanced to amend the composition and the functions of the Canadian Senate and the House of Lords.[108]

Russel underlines that for a second chamber to be effective it must have a different composition from the first chamber; it is also important to consider the method of appointment and the legitimacy of the upper house.[109]

Torre argues that an upper house can be not elected or partially not elected, without losing the democracy of the parliamentary system. He refers to a democratic chamber *latu sensu*, which does not identify itself in the active electoral but in differently organized segments of society. He focuses on a concept of *demos*, meaning a set of categories, groups, corporations which represent society. Putting aside the electoral

[105]See S. GAMBINO, C. AMIRANTE (eds.), *Il Canada un laboratorio costituzionale*, Padova, 2000; M.A. FODDAI (eds.), *Il Canada come laboratorio giuridico*, Turin, 2013.

[106] See P. PASSAGLIA, *Il Senato*, fn. 21, p. 1932.

[107]The issue of the size of the House of Lords remains a subject of debate, because there is no limit on the number of memberships. There are two separate committees in the Commons and in the House of Lords which are occupied in analyzing the size of the upper chamber: in 1999 there were 650 members, there are now over 800. www.parliament.uk/membershipoftheHouseofLords. We can also note a specific difference in the role of the Speaker of the chambers: in Canada, they are authorised to preserve order and to decide questions of order, although all rulings remain subject to an appeal to the full Senate for confirmation or rejection. Instead, the Lord speaker, who is the presiding officer in the House of Lords, guides and assists the house during debate, but they have no power to call members to order, to decide who speaks next or to select amendments. House of Lords Library Note/Canadian Senate Reform.

[108]See M. BURTON -S. PATTEN, *A Time for Boldness - Exploring the Space for Senate Reform*, *Constitutional Forum*, vol.24, n.2, 2015, pp. 1-8; D. PELLERIN, *Between Despair and Denial: What to Do About the Canadian Senate*, in *Review of Constitutional Studies*, 2006, vol. 11, n. 2, pp. 1-36; R. CASELLA, *L'irrisolta questione della riforma del Senato in Canada: dall'"impossibile" revisione costituzionale al Trudeau Plan*, in *Nomos*, 2016, 2. See also A. HASELHURST, *Rethinking House of Lords Reform*, in *Canadian Parliamentary Review*, 2012, pp. 12-16. Upon the House of Lords Reform Act 2014 see G. CARAVALE, *Regno Unito: "Modest and Simple". L'House of Lords Reform Act 2014 e la "piccola" riforma della camera dei Lords,* available in www.forumquadernicostituzionali,it, 19.05.2014. The House of Lords Reform Act 2014 introduces the principle of resignation from the House of Lords and allows for the expulsion of members in certain specified circumstances.

[109]See R. WATTS, *Comparing Federal Systems*, fn.7, p. 86.

investiture, it is important that in the upper house the democratic method is practised in the organization, in the processes, in the inter-institutional relationship and in its relationship with society.[110] It is also considered that democracy and representation of the House of Lords is not a direct consequence of an elective system; this method of selection would allow the upper house to be an expression of the political principle, as the lower chamber. However, it is recognised that the House of Lords already exercises a role in moderation inside the constitutional system, integrating the will expressed in the Commons.[111]

Also of significance is the importance of a chamber that is not dominated by the ruling party. It suggests an independent appointment system, that can be coupled with the election of a proportion of members by regions or nations. The house should be reflective of the voices of society that are not heard in the Commons. So, if the Commons is a party political house, the Lords should be a civic forum, in which minorities can find representation, correcting the incongruities resulting from a majority system.[112]

The evolution of the House of Lords shows a chamber that has changed a lot over time: in 1900 it was mainly hereditary, male and conservative, while currently, most of its members are life peers, with a significant representation in gender and ethnic terms, with many non-partisan members and a more proportional representation of parties.[113]

The activity of the House of Lords demonstrates how it can contribute to debate, with particular and significant perspectives.[114] Lords are freer than members in the House of Commons from party pressures, they have no ambitions for a future career and usually have a specific professional background and skills. Independents are a resource and play an important role, leading the autonomy of the whole House.[115]

The chamber has a reasonable independence from the government, as is demonstrated with the delay of Tax Credits in 2015 or with Health and Social Care in 2012. Recently, the House of Lords voted to send the bill back to the Commons to guarantee the rights of EU citizens resident in the United Kingdom and voted to give veto to Parliament over the final outcome of Theresa May's Brexit negotiations.

There have also been different proposals of reforms for the Canadian Senate[116]: there is a strong necessity for a representation of diversity within the Federation to better protect minority interests and groups

[110]See A. TORRE, *In Praise of the House of Lords*, fn. 39.
[111]See F. PALERMO - M. NICOLINI, *Il bicameralismo, fn. 37, pp.*133 ff.
[112]See D. OLIVER, *The modernization*, above n.33, p. 183.
[113]Available in www.parliament.uk/mps-lords-composition.uk.
[114]See D. OLIVER, *The modernization*, fn.33, p.164.
[115]See A. TORRE, *In Praise of the House of Lords*, fn.39, p. 56.
[116]See R. CASELLA, *L'irrisolta questione,* fn. 108. The issue of Senate reform dates back to 1874, when a reform was proposed to allow each province to choose senators. In the early 1980s, it promoted the "Triple E" Senate (elected, equal and effective). Different proposals were made: the 1981 Canada West Foundation proposal, the 1985 report of the Alberta Select Special Committee on Upper House Reform and the 1992 Charlottetown Accord proposals. Then, in 1984 a report was prepared of a special joint committee of the Senate and House of Commons on Senate reform (the Molgat-Cosgrove Committee); in the 1985 a report was made by the Royal Commission on the

who may be underrepresented in the House of Commons and to obtain effectiveness in federal government decision making.[117] These necessities are linked with the two functions that have grown over the last century, that is the representation of indigenous peoples, minority languages and ethnic groups[118] and the oversight role in committees, the scrutinizing of public policy.[119] Moreover, the Senate should become a more effective forum where regional viewpoints may be brought and reconciled in the deliberative process. It is noted that the Westminster form of government in Canada, unlike Britain, is included into a pluralist society which needs a political parliamentary negotiation. In this sense, the Senate is called to realise an important role in institutional dialogue.[120] Nevertheless, the Canadian Senate has relevant powers, formally similar to the House of Commons' powers, it has not used them to a great degree, because it does not have sufficient legitimacy to use those powers against the elective chamber.[121] Usually, also in the Canadian Senate members are appointed at the end of their career, but the choice of senators is influenced by too much party policy, and so it is often unable to turn into a chamber of experts[122].

It answers to this demand through the initiative taken by the Premier Justin Trudeau to make the Senate more independent. He had the initiative to promote a change in the Senate, without the necessity of constitutional amendments.[123]

In this sense, in 2014 the Supreme Court ruled that Parliament could not unilaterally make reformative changes to the Senate.[124] This decision, released in the Harper Government's reference case, is very interesting because it explains the process of amending the Constitution.

Economic Union and Development Prospects for Canada (the Macdonald Commission) and in 1992 a report by the Special Joint Committee on a Renewed Canada (the Beaudoin-Dobbie Committee). Moreover, the Bill S-4, an Act to amend the Constitution Act, 1867 (Senate tenure), was introduced in the Senate on May 2006; the Bill C-43, Senate Appointment Consultations Act, was introduced in the House of Commons on December 2006 and it was last introduced as part of Bill C-7, Senate Reform Act, on June 2011. See also D. PINARD, *The Canadian Senate; an Upper House Critizised yet Condemned to Survive Unchanged*, in J. LUTHER - P. PASSAGLIA - R. TARCHI (eds.), *A World of Second Chambers,* Milan, pp. 459 ff.

[117]See R. WATTS, *Comparing Federal Systems*, fn.7, p. 86.

[118]Government of Canada, 'About the Senate', 3 July 2016.

[119]See P.G. THOMAS, *Parliament*, fn. 14, p. 167.

[120]See P. PASSAGLIA, *Il Senato*, fn. 21, p. 1940.

[121]See M. RUSSEL, *Reforming*, fn. 5, p. 163.

[122] See C. E. S. *FRANKS, The Parliament of Canada*, Toronto, 1987, p. 75.

[123]See T. Groppi, *Federalismo e Costituzione. La revisione costituzionale negli Stati federali*, Milan, 2001.

[124]See N. KARAZIVAN, *Constitutional Structure and Original Intent: A Canadian Perspective*, 2017 *University of Illinois Law Review,* pp. 639 ff.; E. MACFARLANE, *Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada*, in *McGill Law Journal*, 2015, vol. 60, n. 4, pp. 883-906; C. CORNELL, *Reference re Senate Reform and the Supreme Court of Canada's Clarification of the Constitutional Procedure for Reforming the Canadian Parliament's Upper House*, 20 *Law & Business Review of the Americas,* vol.20, n.3, 2014, pp. 451-462. The leading judgment on the Senate reform was rendered by the Canadian Supreme Court in the decision Re: Authority of Parliament in Relation to the Upper House in 1980, in which the Court expressed that Parliament cannot

The Supreme Court determined that any change to the Senate that would alter its fundamental nature or role would impose on the interests of the provinces and would thus have to be approved by both Parliament and two-thirds of the provinces representing more than 50 percent of the total Canadian populace, as laid out in section 38 of the Constitution Act, 1982.

Moreover, the Court said that an amendment introducing consultative Senate elections would significantly alter the Senate's "fundamental nature and role as a complementary legislative body of sober second thought" and similar amendment changes to the architectural structure of the Constitution. So, the Court determined that such a change could only be implemented via the general 7/50 procedure. Therefore, the Court ruled that Parliament had the authority to repeal the requirement that senators have property with a net worth of $4,000, because this kind of amendment did not affect the institution's fundamental nature and role of the Senate. Then, the Court determined that Parliament could not abolish the Senate on its own and that the Senate could not be abolished without the participation of Parliament and all of the provinces. To sum up, the agreement of Parliament is required and the concurrence of seven provinces representing 50 percent of the population of the provinces (the 7/50 rule) to reform the Senate in an elected chamber. Instead, the unanimous agreement of Parliament and the ten provinces is necessary to abolish it.[125]

It is the decision of the Premier to allow the Senate to be reformed, without the majority necessary to amend the Constitution. In 2014, Trudeau expelled members of the Senate's liberal caucus, so they could sit as independents. Then, when the Liberal Party won a majority in the House of Commons following federal elections and he was nominated Prime Minister, Trudeau appointed senators chosen by the Independent Advisory Board for Senate Appointments. This Board was established in 2016[126] and it must provide to the Prime Minister a list of "five qualified candidates for each vacancy in the Senate with respect to each province or territory for which there is a vacancy or anticipated vacancy and for which the Advisory Board has been convened".[127]

unilaterally amend the constitutional rules on the Senate that affect the "fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process" or that affect its function as a house of sober second thought. A. BARNES - M. BÉDARD - C. HYSLOP - S. SPANO, *Reforming,* fn.24, p. 5.

[125]See S. DION, *Time for Boldness on Senate Reform, Time for the Trudeau Plan*, in *Constitutional Forum constitutionnel*, 24, 2, 2015, p. 61.

[126]The Board is composed by three federal members serving for terms of two years which are joined by two ad hoc members, each serving for one-year terms, from the province or territory of the vacancies to be filled. Then it was decided to add two federal members and two ad hoc members for each province and territory that have Senate vacancies. Government of Canada, 'Democratic Institutions: Backgrounder—Senate Appointments Process', accessed 11 August 2016.

[127]Government of Canada, 'Democratic Institutions: Terms of Reference for the Advisory Board', accessed 11 August 2016.

In a first transitional phase, the Advisory Board sought nominations to fill seven vacancies, then it was envisaged that Canadian citizens could apply for consideration for senatorial vacancies.[128] This is a way to realize participation of society in senators' appointments.

The selection of new members is done on basis of merit, rather than political affiliation. The candidates are requested to have one of the following capacities: great experience both in federal and provincial legislative processes and in public functions; a long service to the community; the acquisition of a leadership position and the achievement of excellent professional results.

The presence of independent Senators allows the upper House to be considered as an unpartisan institution, by preventing a singular parliamentary group from directing the legislative activity of the chamber according to the government policy.[129] Furthermore, the choice of guaranteeing more independence to the senators answers the need to overcome political cleavages.

The activity of the Independent Advisory Board for Senate Appointments refers to the House of Lords Appointment Commission, established in 2000 in the United Kingdom, with the purpose of making nominations for membership of the House of Lords to the independent crossbenches and to value the nominations of candidates for party political membership. It also has the purpose of individuating experts and competent nominations, ensuring that the House represents diversity within the country.[130]

Another possible consideration is about the role of a second chamber in a federal state. Canadian experience shows the possibility of realizing a cooperative federalism even if the Senate is not truly representative of the provincial demands, characterised as a party house rather than a forum of provincial interests. This has been possible because there are many connecting instruments at the inter-government conferences which have been in use since 1868, in order to cover the Senate's failure to represent provincial interests. Conference experiences have grown and been strengthened with the recognition of inter-provincial conferences, then changed into the Annual Premier Conference, transformed since 2003 into the Council of the Federation. In the context of vertical relationships, First Ministers Conference has been established and there are also numerous sectorial conferences with different competences.[131] It is argued that the intergovernmental cooperation cannot take over the representative model[132], but

[128]Government of Canada, 'News Release: Minister of Democratic Institutions Announces Launch of the Permanent Phase of the Independent Senate Appointments Process', 7 July 2016.

[129]See R. CASELLA, *L'irrisolta questione,* fn. 108, p. 32.

[130] Available in www.lordsappointments.independent.gov.uk

[131]See A. BARRA, *Un federalismo dinamico: l'evoluzione dei rapporti tra Stato federale e Province in Canada*, in *Diritto pubblico comparato e europeo*, 2011, pp. 1546 ff; T. GROPPI, *Canada*, f n.18, pp. 62 ff.; R. BIFULCO (eds.) *Ordinamenti federali comparati*, I, Turin, 2010, pp. 424 ff.

[132]See A. MASTROMARINO, *Il federalismo disaggregativo. Un percorso costituzionale negli Stati multinazionali*, Milan, 2010, p. 148; N. BOLLEYER, *Intergovernal Cooperation. Rational Choice in Federal System and Beyond*, New York, 2009; J.

without doubt it has had a significant role in defining Canadian federalism and it has compensated for the inadequacy of the representation of the upper house. These mechanisms answer to a request of reinforcement of integration, expanding the means of communication between society and the state. They operate side by side with the Senate, to represent the issues of pluralism.

So, while the House of Lords seems to hold a representative and integrative role, being an expression of pluralism, even if it shows a necessity to be a more democratic house, in the Canadian Senate there is a democratic problem in the selection process, compounded by a representative crisis of provincial interests.[133]

It seems that the choice to create new forms of public participation may increase the attitude of the Senate to represent provincial interests. The Trudeau plan has been a first step that could be supplemented with popular consultation on the candidature in the provinces, filling the lack of democracy. In this way, the upper house could maintain a different legitimacy from the lower chamber, without there being a second edition of the political cleavages existing in it. Moreover, the choice of combining different ways of selecting members seems to be a necessity on the basis of the complexity of the actual plural society, which requires different ways to express its interests. Appointment can coexist with other methods of selection of members which can defuse the political patronage, emphasising meritocratic choice.

PARKER, *Comparative Federalism and Intergovernmental Agreements. Analyzing Australia, Canada, Germany, South Africa, Switzerland and United States*, New York, 2015, pp.65 ff.

[133]See F. PALERMO, M. NICOLINI, *Il bicameralismo*, fn. 37, pp. 246 ff.