

# Discussing a Reform of the Senate. A Comparison between Italy and Canada

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### Abstract

In March 2015, the Italian Chamber of Deputies voted on a far-reaching constitutional reform; assuming a successful outcome of the long and complex amendment *iter*, this reform will have the effect to radically alter (among other things) the role, nature and composition of the Senate and of the perfect bicameral system currently in place. Interestingly enough, Italy is not the only country currently engaged in a political and institutional debate on a cardinal reform of the Senate: also in Canada, the role and composition of the Upper Chamber has often been contested, as this institution, in its existing arrangement, does not seem to fulfill the tasks intended for it by the framers of the Canadian federation. While over the years a number of unsuccessful attempts to reform have followed one another, the debate on the very nature of the Canadian Senate has culminated, for the time being, with the opinion rendered in 2014 by the Supreme Court of Canada which helps delineating some essential traits of the Upper Chamber. After a brief overview of the constitutional reform of the Senate under discussion in Italy, this paper will illustrate the main points raised in the opinion rendered by the Canadian Supreme Court, with the ultimate objective to show potential points of convergence and divergence between the Italian and Canadian experiences. While the nature of the Canadian federal arrangement is profoundly different from Italian regionalism, this contribution suggests the idea that surprising analogies can be found between these two countries.

## I. An Overview of the Italian Constitutional Reform

### 1. ‘Perfect Bicameralism’ and the Proposed Constitutional Reform

As it is well known, the framers of the 1948 Constitution opted for a ‘perfect’ bicameral system for Italy.<sup>1</sup> The expression ‘perfect

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<sup>1</sup> Giacinto Della Cananea suggests using the expression ‘symmetric’ instead of

bicameralism' implies the existence of a Parliament composed of two 'branches' or 'houses' (the Chamber of Deputies and the Senate) enjoying the same roles and functions.<sup>2</sup> From a practical standpoint, this means that the legislative function is collectively exercised by both branches<sup>3</sup> so that each bill must be approved in the same identical text by both Houses;<sup>4</sup> the Cabinet must have the confidence of both Houses in order to function;<sup>5</sup> and both deputies and senators are elected by universal and direct suffrage<sup>6</sup> for five years.<sup>7</sup>

The scheme just sketched, however, is undergoing a drastic revision: in fact, in March 2015 the Italian Chamber of Deputies voted on a seminal constitutional reform affecting, among other things, the role, nature and composition of the Senate and of Title V of the Constitution (on the relationship between central and peripheral governments).<sup>8</sup> This vote followed the preference formerly

'perfect' bicameralism. See G. Della Cananea, 'The End of (Symmetric) Bicameralism or a Novus Ordo?' *Italian Journal of Public Law*, 4 (2014).

<sup>2</sup> See Art 55 para 1 Constitution. For a historical account of representation and second chambers in a comparative perspective see, *ex multis*, S. Mannoni, 'Reforming the Constitution: A Debate. The «Second Chamber»: A Historical and Comparative Sketch' *Italian Journal of Public Law*, 8-22 (2014).

<sup>3</sup> See Art 70 Constitution.

<sup>4</sup> V. Cerulli Irelli, 'On the Constitutional Reform in the Process of Being Approved in Italy' *Italian Journal of Public Law*, 24 (2014).

<sup>5</sup> See Art 94 para 1 Constitution.

<sup>6</sup> See Arts 56 para 1 and 58 para 1 Constitution. The only differences existing between the two Houses concern the distinct age limits required to elect Senate members and being elected as senators (pursuant to Art 58 Constitution, senators are elected by voters who are at least twenty-five years old, and only electors who have attained the age of forty are eligible for election to the Senate), and the number of deputies and senators sitting in each Chamber (six hundred thirty for the Chamber of Deputies and three hundred fifteen for the Senate, pursuant to Arts 56 para 2 and 57 para 2 Constitution, respectively). Historically, the age difference is explained by the fact that the Senate is presented as 'elemen[t] of reflection and wisdom' within the Parliament. See H. Brun, G. Tremblay and E. Brouillet, *Droit Constitutionnel* (Cowansville, QC: Éditions Yvon Blais, 5<sup>th</sup> ed, 2008), 337.

<sup>7</sup> See Art 60 para 1 Constitution.

<sup>8</sup> See, *ex multis*, G. Della Cananea, n 1 above, 3. While acknowledging the important implications of the reform of Title V of the Constitution, this paper will exclusively focus on the consequences of the reform of the Senate. Incidentally, however, among the changes to Title V, it is important to mention the suppression of shared legislative competences between the regions and the state (currently enshrined in Art 117 para 3 Constitution) and the consequent transfer to exclusive

expressed by the Senate in the summer of 2014.<sup>9</sup> If the complex constitutional amendment procedure will be successfully completed, the Italian Senate will soon assume a brand new connotation.<sup>10</sup>

To begin with, the reform under discussion proposes to bring significant changes to Arts 57 and 58 Constitution on the number of senators and their election. In fact, while the number of deputies (six

state powers of most of these subject matters; also, the reform will re-introduce a so-called 'supremacy clause' whereby the national legislator will be able to make laws also in areas of regional competence if there is a national interest to protect. For an overview of the discussed reform on aspects other than the Senate, see, *ex multis*, A. Lucarelli, 'Le Macroregioni «per funzioni» nell'intreccio multilivello del nuovo tipo di Stato', 2-3, available at <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=29074> (last visited 5 October 2015). Similarly, this contribution does not take into account the exquisitely political ramifications of the reform, preferring to concentrate on its purely constitutional and institutional aspects. Readers who are interested in the political facets of the discussion can refer to the following links for additional details: *Corriere della Sera* online, available at <http://goo.gl/vQ8MrX> (last visited 8 October 2015).

<sup>9</sup> It is perhaps worth emphasizing how this is not the first time that an institutional reform is discussed and proposed throughout the last sixty-seven years of republican history, although previous attempts have been unsuccessful. Giulio Enea Vigevani offers a detailed account of the various reforms that followed one another over the last few decades. See G.E. Vigevani, 'The Reform of Italian Bicameralism: the First Step' *Italian Journal of Public Law*, 56 et seq (2014).

<sup>10</sup> In fact, pursuant to Art 138 Constitution, '[l]aws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils [...] A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members'. As noted, the Senate voted for the first time in August 2014 and the Chamber of Deputies voted for the first time in March 2015. The text voted by the Chamber of Deputies will now revert to the Senate for approval, at simple majority; however, this vote will concern only the sections of the bill amended by the Chamber of Deputies. This will complete the first step of the constitutional amendment procedure. Next, both Houses will have to approve (or reject) the same text, without being able to amend it. While for the first reading a vote by simple majority is sufficient in both Houses, the second reading requires a vote by a majority of two-thirds of the members in each Chamber. If the bill is approved by simple majority in the second reading, a popular referendum may be called. See *Il Sole 24 Ore* online, available at <http://240.it/zv9525> (last visited 8 October 2015).

hundred thirty) and their election by universal suffrage will not be changed,<sup>11</sup> senators will be reduced from three hundred fifteen to hundred and they will no longer be democratically elected by universal and direct suffrage; rather, ninety-five senators will be appointed by regional councils among its members with proportional method, and five senators will be appointed by the President of the Republic among individuals with outstanding merits.<sup>12</sup> The ninety-five senators-councillors will be 'distributed' among regions based on demographic criteria (ie the most populous regions will have more senators), but each region will have at least two senators. The duration of the senatorial mandate will also change: the five senators chosen by the President of the Republic will be appointed for seven years, while the appointment of the ninety-five regional senators will equal the duration of their regional mandate.<sup>13</sup>

Furthermore, although the bicameral nature of the Parliament will not be altered, pursuant to the changes proposed in the reform only the Chamber of Deputies will represent 'the Italian people' and only its members will 'represent the Nation',<sup>14</sup> while the Senate will exclusively represent 'territorial institutions'.<sup>15</sup>

Most importantly, however, the proposed constitutional reform will deeply transfigure the legislative function as currently framed. In fact, the Chamber of Deputies will remain the only 'pure' legislative assembly, thus entrusted with full legislative powers,<sup>16</sup> while the Senate will enjoy full legislative functions on constitutional reforms

<sup>11</sup> See *Il Sole 24 Ore* online, available at <http://goo.gl/DU3cGt> (last visited 8 October 2015).

<sup>12</sup> See *Il Sole 24 Ore* online, available at <http://goo.gl/DU3cGt> (last visited 8 October 2015); *Corriere della Sera* online, available at <http://goo.gl/zBEjvq> (last visited 8 October 2015); *Repubblica* online, available at <http://goo.gl/4jvPHs> (last visited 8 October 2015). Incidentally, the councils of the autonomous provinces of Trento and Bolzano will also appoint their members.

<sup>13</sup> See *Il Sole 24 Ore* online, available at <http://goo.gl/DU3cGt> (last visited 8 October 2015); *Corriere della Sera* online, available at <http://goo.gl/h6VGi5> (last visited 8 October 2015); *Repubblica* online, available at <http://goo.gl/xXEnRX> (last visited 8 October 2015).

<sup>14</sup> See V. Cerulli Irelli, n 4 above, 26.

<sup>15</sup> *Ibid* 26.

<sup>16</sup> See *Corriere della Sera* online, available at <http://goo.gl/NglMuX> (last visited 8 October 2015); see also *Repubblica* online, available at <http://goo.gl/Xha9cG> (last visited 8 October 2015).

and constitutional laws only, and for a number of other specific situations, including laws on the fundamental functions of municipalities and metropolitan cities and laws establishing general rules, forms and terms of the Italian participation in creating and implementing EU norms.<sup>17</sup> As for all other bills, they will be sent to the Senate after the approval of the Chamber of Deputies, but while the Senate may suggest amendments, the Chamber of Deputies will have a final say on them. On a number of laws pertaining to the relationship between the central government and local autonomies (Regions), however, the Chamber of Deputies could disregard the Senate's requests only by absolute majority.<sup>18</sup> If the Senate does not require the examination of a given bill, the Chamber of Deputies will promulgate it.

Another key change contained in the reform is that the Senate will no longer vote the confidence to the Cabinet, thus leaving the Chamber of Deputies as the only House entrusted with granting the confidence vote: this implies that the Chamber will be the only branch exercising 'the function of political direction and control'.<sup>19</sup>

Finally, senators could not be arrested or subjected to tapping without previous authorization of the Senate: in this sense, 'privileges and immunities from prosecution remain the same, despite the diversity, respectively, of the functions and procedures for the election of members of both Houses'.<sup>20</sup> Also, senators will not be entitled to parliamentary compensations (a prerogative of Deputies only) but they will continue to enjoy the compensations due for their role as mayors or regional councillors.<sup>21</sup>

In addition to reduce the costs of political institutions, the

<sup>17</sup> See A. Lucarelli, n 8 above, 3, fn 2, for the complete list as contained in the 'new' Art 70 Constitution.

<sup>18</sup> See *Il Sole 24 Ore* online, available at <http://24o.it/ASjtkg> (last visited 8 October 2015); *Corriere della Sera* online, available at <http://goo.gl/QdUqnE> (last visited 8 October 2015); *Repubblica* online, available at <http://goo.gl/Pu2hrI> (last visited 8 October 2015). See also V. Cerulli Irelli, n 4 above, 28-29.

<sup>19</sup> V. Cerulli Irelli, n 4 above, 26; G.E. Vigevani, n 9 above, 67. See also *Corriere della Sera* online, available at <http://goo.gl/navVXU> (last visited 8 October 2015); *Repubblica* online, available at <http://goo.gl/hSEYD5> (last visited 8 October 2015).

<sup>20</sup> V. Cerulli Irelli, n 4 above, 26, 28. See also *Il Sole 24 Ore* online, available at <http://goo.gl/d6ZZqw> (last visited 8 October 2015); *Corriere della Sera* online, available at <http://goo.gl/GSkxeu> (last visited 8 October 2015).

<sup>21</sup> See *Il Sole 24 Ore* online, available at <http://goo.gl/kYv9CJ> (last visited 8 October 2015).

suggested changes to the Senate are intended to serve two key objectives: on one side, depart from the aforementioned ‘perfect bicameralism’ by diversifying the tasks and structure of two branches;<sup>22</sup> on the other side, create a *forum* where regional (and local) interests can be expressed.<sup>23</sup> As expected, the proposed reform has not been exempt from criticism, and some of its most contested aspects will be outlined in part III of this paper. Now it is time to move to Canadian federalism and to the main points raised by the Supreme Court of Canada in its *Senate reference*.<sup>24</sup>

## II. Canadian Federalism and the *Senate Reference*

### 1. The Canadian Federation

Canada is a federal state. In fact, as the preamble to the *Constitution Act, 1867* clearly indicates, it was the express desire of the provinces of Canada, Nova Scotia, and New Brunswick ‘to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland’.<sup>25</sup> However, as Hugo Cyr notes, in Canadian constitutionalism it is very common to use the term *confederation* to ‘refer to the coming together of the three British colonies to form the Dominion of Canada in 1867’, although Canada is not a confederation.<sup>26</sup> Similarly, Hugo Cyr notes that

<sup>22</sup> For a brief explanation of the rationale justifying the choice of a perfect bicameralism, see G. Della Cananea, n 1 above, 5; V. Cerulli Irelli, n 4 above, 25.

<sup>23</sup> Lorenza Violini well explains the rationale behind keeping bicameralism or switching to a unicameral system (thus eliminating the Senate). See L. Violini, ‘The Reform of Italian Bicameralism: Current Issues’ *Italian Journal of Public Law*, 33-35 (2014). I will revert to the discussion on the abolition of the Senate in part III of this paper.

<sup>24</sup> Reference re Senate Reform, 2014 SCC 32 (*Senate reference*). All the Supreme Court judgments cited in this paper can be freely consulted and retrieved, in English or French, from the Canadian Supreme Court website available at <http://www.scc-csc.gc.ca/case-dossier/judgment-jugement-eng.aspx> (last visited 15 October 2015).

<sup>25</sup> Preamble to the *Constitution Act, 1867* (emphasis added). The entire constitutional text (including the preamble) is available online in English and French at <http://laws-lois.justice.gc.ca/eng/Const/page-1.html> (last visited 15 October 2015).

<sup>26</sup> H. Cyr, ‘Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism’ 23 *Constitutional Forum Constitutionnel*, 4, 20 (2014). A confederation

Canada is not a unitary state either although the *Constitution Act, 1867* is referred to as an ‘Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof’.<sup>27</sup>

The fact that Canada is a federation is confirmed by the Supreme Court of Canada (SCC) in one of its seminal opinions, where federalism is identified as one of the ‘four fundamental and organizing principles of the Constitution’.<sup>28</sup> The SCC also observes that federalism ‘was the political mechanism by which diversity could be reconciled with unity’<sup>29</sup> and that it represented the ‘political and legal response to underlying social and political realities’.<sup>30</sup> In this sense, it received ‘primary textual expression’ in the ‘basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*’.<sup>31</sup> In fact, in a federal system such as the Canadian one, ‘political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*’.<sup>32</sup> Finally, federalism ‘recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction’.<sup>33</sup>

is commonly referred to as a form of *supra* national arrangement composed of independent and sovereign states; in other words, it is some sort of international organization where sovereign states join together, on the basis of an international treaty, but without a transfer of sovereignty. See R. Bin and G. Falcon, *Diritto Regionale* (Bologna: Il Mulino, 2012), 47. Based on this definition, Canada certainly does not display the typical traits of a confederation, as its constituent units (ten provinces and three territories) are not independent states bound together by an international treaty.

<sup>27</sup> H. Cyr, n 26 above, 20.

<sup>28</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras 32 and 55 (*Secession reference*). The other ‘fundamental and organizing principles of the Constitution’ are: democracy; constitutionalism and the rule of law; and respect for minorities (*ibid*).

<sup>29</sup> *Ibid* para 43.

<sup>30</sup> *Ibid* para 57.

<sup>31</sup> *Ibid* para 47.

<sup>32</sup> *Ibid* para 56. Sections 91 and 92 of the *Constitution Act, 1867* list in great detail the legislative powers of federal and provincial governments, respectively.

<sup>33</sup> *Ibid* para 58.

## 2. The Supreme Court of Canada and its Reference Jurisdiction

Once ascertained that Canada is a federal state, it may be helpful to briefly sketch the genesis, composition and role of the SCC and, specifically, of its reference jurisdiction.

As Peter W. Hogg contends, the SCC was not established at confederation, in 1867: in fact, at that time, the Judicial Committee of the Privy Council (JCPC), located in London (UK), ‘served as the final court of appeal from all British colonies’.<sup>34</sup> Nonetheless, section 101 of the *Constitution Act, 1867* concedes that ‘[t]he Parliament of Canada may [...] provide for the Constitution, maintenance, and organization of a general court of appeal for Canada’. Pursuant to this provision, in 1875 the federal parliament enacted a statute (the *Supreme Court Act*)<sup>35</sup> establishing the SCC.<sup>36</sup> The detachment from the jurisdiction of the JCPC occurred at different stages, but reached full completion only in the 1950s.<sup>37</sup>

Presently, the SCC comprises nine judges (one chief justice and eight puisne judges): three of them come from Quebec, three from Ontario, two from the Western provinces, and one from the Atlantic provinces.<sup>38</sup> The Chief Justiceship usually alternates between a French-speaking and an English-speaking justice, although exceptions exist.<sup>39</sup> Furthermore, pursuant to section 4(2) of the *Supreme Court Act*, SCC judges ‘shall be appointed by the Governor in Council’ meaning the federal cabinet: in other words, they receive executive appointment.<sup>40</sup>

<sup>34</sup> P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Student ed, 2013), 8-1.

<sup>35</sup> R.S.C., 1985, available in English and French at <http://laws-lois.justice.gc.ca/PDF/S-26.pdf> (last visited 15 October 2015).

<sup>36</sup> P.W. Hogg, n 34 above, 8-2. While for all cases commenced after 1949 the court of last resort became the SCC, the last Canadian appeal was rendered by the JCPC in 1959.

<sup>37</sup> *Ibid* 8-4.2.

<sup>38</sup> *Ibid* 8-5. See also sections 4(1) and 6 of the *Supreme Court Act*. The Western provinces are Manitoba, Saskatchewan, Alberta and British Columbia; the Atlantic provinces include Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland & Labrador.

<sup>39</sup> *Ibid* 8-5.

<sup>40</sup> *Ibid* 8-7.

One important feature of the SCC, that is particularly relevant for our purposes, is the so-called ‘reference jurisdiction’. In fact, pursuant to section 53(1) of the *Supreme Court Act* ‘[t]he Governor in Council may refer to the Court for hearing and consideration important questions of law or fact’.<sup>41</sup> Section 53(4) further explains that ‘[w]here a reference is made [...], it is the duty of the Court to hear and consider it and to answer each question so referred’.<sup>42</sup> The SCC can thus give ‘advisory opinions’<sup>43</sup> and in this sense it differentiates from other courts of last resort such as the Supreme Court of the United States, which has persistently refused to render advisory opinions as they lack the required elements of ‘case’ or ‘controversy’ defining the judicial power in the United States.<sup>44</sup> The advisory opinions rendered by the SCC to the government are not technically considered an expression of the judicial function: in fact, on one side, they lack ‘the adversarial and concrete character of a genuine controversy’ and, on the other, this action is usually taken by the Attorney General acting for the Executive.<sup>45</sup> Furthermore, because of their ‘advisory character’, the answers provided by the SCC are not ‘binding’ on the parties, and do not have the same weight as a precedent; however, they are usually treated as pure judicial opinions.<sup>46</sup> While the reference jurisdiction procedure is available to answer also non-constitutional issues, it has mainly been used for constitutional questions.<sup>47</sup> Usually, the questions referred to the SCC concern the constitutionality of a *federal* law (or of a law proposal), but nothing excludes the possibility to refer a question on the constitutionality of a *provincial* law.<sup>48</sup> Finally, pursuant to section

<sup>41</sup> R.S.C., 1985, c. S-26, available online in English and French at <http://laws-lois.justice.gc.ca/PDF/S-26.pdf> (last visited 15 October 2015).

<sup>42</sup> However, despite this duty, the SCC has at times ‘exercised a discretion not to answer a question posed on a reference’ particularly in situations when the question had become moot, was not ripe, was too vague, was not a legal question, or was not ‘accompanied by enough information to provide a complete answer’. See P.W. Hogg, n 34 above, 8-18, 8-19.

<sup>43</sup> *Ibid* 8-15.

<sup>44</sup> *Ibid* 8-17; see also L.H. Tribe, *American Constitutional Law* (New York, NY: Foundation Press, 3<sup>rd</sup> ed, 2000), I, 328-330.

<sup>45</sup> P.W. Hogg, n 34 above, 8-17.

<sup>46</sup> *Ibid* 8-18.

<sup>47</sup> *Ibid* 8-15, 8-16.

<sup>48</sup> *Ibid* 8-16.

53(1) of the *Supreme Court Act*, it is the ‘Governor in Council’ that may direct a reference to the SCC: by convention,<sup>49</sup> this expression means the federal government (cabinet), which is thus the only body enjoying the privilege of referring questions to the Court.<sup>50</sup>

### 3. The Canadian Senate

As noted above, Canada is a federal state. According to federal theory, one of the distinctive traits of a *pure* or *classic* federation is the presence of a chamber (usually styled Senate, or Upper Chamber) representing the interests of the constituent units of the federation at central level.<sup>51</sup> In this way, these constituent units have a forum where they can advance their claims at national level and participate in federal legislation.<sup>52</sup> Yet, as it will be further explained, this is not entirely true for Canada.

Section 17 of the *Constitution Act, 1867* mandates that the Parliament of Canada consists of ‘the Queen, an Upper House styled the Senate, and the House of Commons’ and sections 21 to 36 of the

<sup>49</sup> In Canadian law, conventions are ‘rules of the Constitution’ which ‘are not enforced by the law courts’ and whose function is to ‘prescribe the way in which legal powers shall be exercised’. As Peter W. Hogg explains, an example of constitutional convention in Canadian law is this: while the *Constitution Act 1867* and other statutes confer extensive powers to the Governor General, by convention the latter ‘will exercise those powers only in accordance with the advice of the cabinet or in some cases of the Prime Minister’. However, although not enforceable in courts, the latter have from time to time recognized them. See P.W. Hogg, n 34 above, 1-22, 1-22.1 and 1-22.2.

<sup>50</sup> *Ibid* 8-16. This implies that neither a provincial government nor a private person can direct such a reference, although other mechanisms are available for them. For instance, a provincial government can direct a reference to the provincial court of appeals and a private individual can access a superior court of the province by way of declaratory action challenging the validity of a federal or provincial law (*ibid*).

<sup>51</sup> *Ex multis*, see H. Brun, G. Tremblay and E. Brouillet, n 6 above, 336; N. Duplé, *Droit Constitutionnel: principes fondamentaux* (Montréal, QC: Wilson & Lafleur, 5<sup>th</sup> ed, 2011), 203; S. Mangiameli, *Il Senato Federale nella Prospettiva Italiana* (2010), available at [www.issirfa.cnr.it](http://www.issirfa.cnr.it) (last visited 15 October 2015). The way these constituent units are called vary from federation to federation. In Canada, they are called *provinces*; in the United States, they are called *states*; in Germany, they are called *länder*; in Switzerland, they are called *cantons*, etc.

<sup>52</sup> *Ex multis*, see H. Brun, G. Tremblay and E. Brouillet, n 6 above, 407 et seq; N. Duplé, n 51 above, 203.

same *Act* sketch the main features of the Senate. A first distinctive and rather contested characteristic of the Canadian Senate is that its members are not democratically elected (as it happens for the members of the House of Commons) but are appointed by the executive: in fact, it is the Governor General (which, by convention, means the Cabinet) who appoints senators.<sup>53</sup>

The number of senators is one hundred and five and, once appointed, they hold office until the age of seventy-five.<sup>54</sup> The number and distribution of senators reflect provincial subdivisions; in fact, for this specific purpose Canada is divided into four 'divisions' (Ontario, Quebec, the Maritime provinces, and the Western provinces).<sup>55</sup> Ontario, Quebec, the Maritime Provinces and the Western provinces enjoy twenty-four senators each;<sup>56</sup> Newfoundland is represented by six members; and Yukon, the Northwest Territories and Nunavut each have one member in the Senate.<sup>57</sup>

Section 23 of the *Constitution Act, 1867* lists some of the requirements that an individual must meet in order to be appointed senator. In addition to an age requirement (thirty years old, as specified by section 23(1)) and a residency requirement (he or she shall be a resident of the province for which appointment is sought: section 23(5)), the appointee shall also enjoy some 'real property' and 'personal property' requirements.<sup>58</sup>

<sup>53</sup> Section 24 of the *Constitution Act, 1867*. See also H. Brun, G. Tremblay and E. Brouillet, n 6 above, 343; N. Duplé, n 51 above, 204, who clarifies that, under Canadian constitutional law, all the powers held by the governor general are ruled by constitutional convention, so it is in fact the Prime Minister who appoints the senators and then the governor general validates the appointments (ibid). See also *Senate reference* n 24 above, para 50.

<sup>54</sup> See sections 21 and 29(2) of the *Constitution Act, 1867*.

<sup>55</sup> See section 22 of the *Constitution Act, 1867*.

<sup>56</sup> For the Maritime provinces, ten senators represent Nova Scotia, ten represent New Brunswick, and four represent Prince Edward Island; for the Western provinces, Manitoba, British Columbia, Saskatchewan and Alberta are each represented by six senators: section 22 of the *Constitution Act, 1867*.

<sup>57</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 341; N. Duplé, n 51 above, 204. Incidentally, Newfoundland joined confederation in 1949.

<sup>58</sup> As for the 'real property requirement', section 23(3) of the *Constitution Act, 1867* provides that each senator 'shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in Franc-

Finally, as far as powers are concerned, the House of Commons and the Senate enjoy the same powers, with one exception: money bills (ie bills ‘for appropriating any part of the public revenue, or for imposing any tax or impost’ to use the constitutional wording) shall originate in the House of Commons only (section 53 of the *Constitution Act, 1867*). Another important distinction between the two branches is that the Cabinet is accountable only before the House of Commons and not before the Senate.<sup>59</sup>

Because of the features just outlined, the very nature, composition and powers of the Canadian Senate have regularly been questioned and made the object of proposed reforms. In particular, the executive appointment of senators has often raised the question whether the Senate is an undemocratic institution because of the non-election of its members.<sup>60</sup>

Another criticism often moved to the Senate has been of not actually fulfilling the traditional role of the second chamber in a federal state, as the provincial-based number and distribution of senators does not imply that they sit in representation of the interests of their provinces, as it should be in a typical federation.<sup>61</sup> In fact, the

alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same’. As for the ‘personal property’ requirement, section 23(4) of the *Constitution Act, 1867* provides that the senators’ real and/or personal property ‘shall be together worth four thousand dollars over and above his debts and liabilities’.

With regards to Quebec, further specifications are included in sections 22 and 23 of the *Constitution Act, 1867*. In fact, section 22 provides that ‘each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions’ of Quebec. Furthermore, as per section 23, each senator from Quebec ‘shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division’. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 342; N. Duplé, n 51 above, 205.

<sup>59</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 339; N. Duplé, n 51 above, 205.

<sup>60</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 346-347.

<sup>61</sup> Ibid 336, who argue that the Canadian Senate ‘does not effectively ensure provincial participation at federal level in the exercise of the legislative function’. See also N. Duplé, n 51 above, 203-204, who observes that, because of the executive appointment of senators and of the composition of the Senate, the latter cannot be considered a true federal chamber. Similarly, she notes that Canadian provinces do not participate in the process to appoint senators.

federal Prime Minister does not choose senators in a way that ‘they can convey the aspirations of the province for which they are appointed’.<sup>62</sup> For this reason, some theorists contend that the only link between senators and provinces is having their domicile on the territory of the province and have some property there. Consequently, more than a true federal Upper Chamber, the Canadian Senate seems to express Canadian pluralism, as efforts are made to appoint to the Senate ‘individuals representing the different religious, ethnic, economic, professional, etc groups’ living in Canada.<sup>63</sup>

Among the various proposals made in the past to reform the Senate, it is worth mentioning those contained in the Meech Lake and Charlottetown Accords. The Meech Lake Accord of 1987 was a package of constitutional amendments intended to allow Quebec to endorse the *Constitution Act, 1982* imposed on the province despite its opposition. Among other things, this Accord contained a number of provisions to change the way senators were appointed: based on the suggestions made, the federal government would choose senators from a list of names drafted by the province to be represented. However, the Western provinces were not entirely satisfied with the proposal, and were looking more at a ‘Triple E’ senate (one which would be elected, equal and effective). The subsequent Charlottetown Agreement of 1992, which would somehow better reflect these demands, was rejected by referendum.<sup>64</sup>

More recently, other proposals were made to change certain features of the Senate. For example, Bill S-4, tabled in 2006, proposed to replace the current senatorial term of office with a term of eight years, renewable.<sup>65</sup> Tabled in 2007, Bill C-20 proposed consultative elections of nominees whereby ‘the names of the winners of national consultative elections would be submitted to the Prime Minister of Canada, for consideration [...] when recommending nominees to the Governor General’.<sup>66</sup> Similarly, Bill C-7 (which was given first reading in 2011) provided that ‘Senators would sit for a

<sup>62</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

<sup>63</sup> Ibid 338.

<sup>64</sup> *Ex multis*, see N. Duplé, n 51 above, 204, 634-635.

<sup>65</sup> *Senate reference* n 24 above, para 7.

<sup>66</sup> Ibid para 8.

non-renewable nine-year term' and set out 'a model statute for provincial and territorial legislation creating consultative elections' so that the 'Prime Minister «must» consider names from the list of successful candidates'.<sup>67</sup> These proposed reforms thus aimed at fixing the democratic deficit and almost life tenure of senators. All three bills, however, did not survive the approval project, but some of their suggestions were resurrected before the SCC in the *Senate reference*, as I am going to explain now.

#### 4. The *Senate Reference*

Following the reference jurisdiction procedure detailed above, in February 2013 the Canadian Government addressed to the SCC a number of questions on how to accomplish a reform of the Senate 'under the Constitution'.<sup>68</sup> While the SCC clearly stated that its role was not 'to speculate on the full range of possible changes to the Senate'<sup>69</sup> but simply 'to determine the legal framework for implementing the specific changes contemplated in the questions',<sup>70</sup> the opinion rendered by the SCC in 2014 offers the ideal opportunity to reflect on the role and purposes of the Senate within the Canadian constitutional system. In the next paragraphs I will thus illustrate some of the key points made by the SCC in the *Senate reference* which, in my opinion, are most helpful for our comparative purposes with the Senate reform discussed in Italy.

The four questions addressed to the SCC by the Governor in Council are: (1) Can the Canadian Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can the Canadian Parliament unilaterally set fixed terms for Senators? (3) Can the Canadian Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must

<sup>67</sup> Ibid para 9.

<sup>68</sup> Ibid para 20. This was an opinion rendered by judges McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

<sup>69</sup> *Senate reference* n 24 above, para 4. In fact, the SCC further specifies that the 'desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures' (ibid) and that '[t]he question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution' (ibid 20).

<sup>70</sup> *Senate reference* n 24 above, para 4.

own land worth four thousand in the province for which they are appointed and have a net worth of at least four thousand (4). The degree of consent required to abolish the Senate.<sup>71</sup> As it can be noted, three of the four questions pertain to the possibility to change or amend certain features of the Senate by the federal Parliament acting alone (ie without provincial participation).<sup>72</sup>

Before addressing each question, the SCC reiterates the fact that the Senate 'is one of Canada's foundational political institutions' laying 'at the heart of the agreements that gave birth to the Canadian federation'.<sup>73</sup> The importance of the Senate as a political institution is buttressed by the wording of the preamble of the *Constitution Act, 1867* mandating that '[w]hereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom'. For the SCC, this means that the framers of the Canadian confederation 'wanted to preserve the British structure of a lower legislative chamber composed of elective representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state'.<sup>74</sup> The SCC further observes that, being modelled on the British House of Lords (but 'adapted to Canadian realities'), one of the purposes of the Senate was to provide 'sober second thought' on the legislation adopted in the House of Commons.<sup>75</sup> The other purpose of the Senate was to provide 'a distinct form of representation for the regions that had joined Confederation'.<sup>76</sup> In fact, the SCC continues, '[w]hile representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population'.<sup>77</sup> With time, however, the Senate has become the ideal forum 'to represent

<sup>71</sup> These four questions are listed in the *Senate reference* n 24 above, para 2.

<sup>72</sup> *Ibid* para 49.

<sup>73</sup> *Ibid* para 1.

<sup>74</sup> *Ibid* para 14.

<sup>75</sup> *Ibid* para 15, quoting the expression used in the 1865 parliamentary debates by John A. Macdonald, the future first Prime Minister of Canada.

<sup>76</sup> *Ibid* para 15.

<sup>77</sup> *Ibid* para 15.

various groups that were under-represented in the House of Commons' such as 'ethnic, gender, religious, linguistic, and Aboriginal groups' thus losing, as noted above, the trait typical of most *federal* Senates to represent the interests of the constituent units.<sup>78</sup>

Yet, in spite of these noble purposes, the SCC acknowledges the difficulties that have always accompanied the life and work of this 'foundational political institution' since 'from its first sittings, voices have called for reform [...] and even, on occasion, for its outright abolition'.<sup>79</sup> Reform proposals were particularly urged especially in the years before 1982,<sup>80</sup> and mainly revolved around three issues: modification of seats distribution; limitation of Senate powers; and appointment of senators.<sup>81</sup> In any event, the SCC recalls how, despite 'ongoing criticism and failed attempts at reform, the Senate has remained largely unchanged since its creation'<sup>82</sup> thus confirming a certain resistance towards a reform of this institution.

Next, the SCC emphasizes the complex architecture of the Canadian Constitution. By recalling its *Secession reference*, the SCC reaffirms the idea that the Canadian Constitution shall be viewed as 'having an «internal architecture»'<sup>83</sup> meaning that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'.<sup>84</sup> Consequently, constitutional amendments shall not be seen

<sup>78</sup> Ibid para 16.

<sup>79</sup> *Senate reference* n 24 above, para 1. This antipathy towards the Senate, and the suggestion to abolish it, is particularly strong at provincial level: in fact, none of the ten provincial governments enjoy a second chamber (or the equivalent of a Senate), so many feel that there is no need to have a Senate at federal level.

<sup>80</sup> Ibid paras 17-18. In Canadian constitutionalism, 1982 is a momentous year in that it coincided with the *Patriation* of the Constitution, meaning the entry into force of the *Constitution Act, 1982* which contained an entirely domestic constitutional amendment procedure, as will be further explained in the paper. Incidentally, the *Constitution Act, 1982* also introduced the Canadian Charter of Rights and Freedoms.

<sup>81</sup> Ibid para 18.

<sup>82</sup> Ibid para 20.

<sup>83</sup> Ibid para 26 (citing para 50 of the *Secession reference*).

<sup>84</sup> Ibid para 26 (citing para 50 of the *Secession reference*). This image of a 'constitutional architecture' is one of the key messages contained in the *Senate reference*, and it becomes particularly illuminating if we consider the complex

as a mere ‘textual changes’ as they include ‘changes to the Constitution’s architecture’.<sup>85</sup>

The SCC then reveals the main steps that led to the enactment of the constitutional amendment formula contained in Part V of the *Constitution Act, 1982* and the political discussions surrounding *patriation*,<sup>86</sup> including a detailed illustration of the various amending procedures.<sup>87</sup> Prior to *patriation*, ‘constitutional amendment in

structure of the Canadian constitution. In fact, the expression ‘Canadian constitution’ refers to a number of documents entered into force at different times. As indicated by section 52(2) of the *Constitution Act, 1982* the Canadian constitution comprises: (a) the *Canada Act, 1982* (which includes the *Constitution Act, 1982*); (b) all Acts and orders referred to in the schedule; and (c) all amendments to the Acts and orders mentioned in paras (a) and (b). The *Constitution Act, 1867* (which contains all the articles on the Senate discussed above) is part of the documents listed in the schedule *sub* section 52(2)(b). See *Senate reference* n 24 above, para 24. Consequently, because of this complex structure, the SCC encourages to see all these different documents as a whole, even if drafted at different times, with the individual provisions ‘intended to interact with one another’ and not as a ‘mere collection of discrete textual provisions’. See *Senate reference* n 24 above, paras 26 and 27.

<sup>85</sup> *Ibid* para 27.

<sup>86</sup> These can be found at paras 30-31 of the *Senate reference*.

<sup>87</sup> *Ibid* para 32. The amendment procedure detailed in part V of the *Constitution Act, 1982* is very complex, but it can be summarized following the description of the four categories offered by the SCC. The first category is the general amending formula detailed in section 38 of the *Constitution Act, 1982*, whereby constitutional amendments shall be ‘authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces’. This is why this general rule is often referred to as ‘7/50’ formula. The rationale behind this procedure is that ‘substantial provincial consent must be obtained for constitutional change that engages provincial interests’. This provision also grants to the provinces a right to ‘opt out’ of constitutional amendments that ‘derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province’. See *Senate reference* n 24 above, para 34. While the ‘7/50’ amendment formula is the general rule (to the point that all other procedures shall be seen as ‘exceptions’ to it), section 42 of the *Constitution Act, 1982* complements the provision of section 38 by listing a number of categories where the ‘7/50’ formula shall be applied, such as ‘the powers of the Senate and the method of selecting Senators’ as well as ‘the number of members by which a province is entitled to be represented in the Senate and the residence qualification of Senators’. *Senate reference* n 24 above, paras 36 and 37. The second category is the so-called ‘unanimous consent’ procedure outlined in section 41 of the *Constitution Act, 1982*, requiring ‘the unanimous consent of the Senate, the House

Canada required the adoption of a law by the British Parliament following a joint resolution addressed to it by the Senate and the House of Commons, since the *Constitution Act, 1867* was an Act of the British Parliament'.<sup>88</sup> And while there was no 'formal requirement' to consult provincial governments to that effect, in practice a constitutional convention had developed requiring provincial consent for those changes 'directly affecting federal-provincial relations'.<sup>89</sup> After these general remarks, the SCC reverts to the four questions of the *Reference*, which I am going to detail in the next paragraphs.

**a. The first Question: Consultative Elections for Appointment of Senators**

As noted, the first question the SCC is called to answer pertains to the election of senators and, more specifically, whether the Canadian Parliament can 'unilaterally implement a framework for consultative elections for appointments to the Senate'.<sup>90</sup> As already explained, in Canada members of the Senate are appointed (or 'summoned') by the Governor General acting on the advice of the Prime Minister.<sup>91</sup> For

of Commons, and all the provincial legislative assemblies for the categories of amendments enumerated in the provision' and is 'designed to apply to certain fundamental changes to the Constitution of Canada'. Ibid para 41. The third category is also referred to as 'special arrangements' procedure and is detailed in section 43 of the *Constitution Act, 1982*. It applies 'to amendments in relation to provisions of the Constitution [...] that apply to some, but not all, of the provinces'. Ibid para 43. The purpose of this procedure is to make sure that those provisions that apply only to one or more, but not all, of the provinces 'cannot be amended without the consent of the provinces for which the arrangement was devised'. See ibid para 44. Finally, the 'unilateral federal and provincial procedure' detailed in sections 44 and 45 of the *Constitution Act, 1982* 'give[s] the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government'. See ibid para 48. As the SCC further explains, this procedure is a reflection of Canadian federalism, whereby the 'Parliament and the provinces are equal stakeholders in the Canadian constitutional design' so that '[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution'. Ibid para 48.

<sup>88</sup> Ibid para 29.

<sup>89</sup> Ibid para 29.

<sup>90</sup> Ibid para 2.

<sup>91</sup> See sections 17, 24, 32 and 37 of the *Constitution Act, 1867*; see also *Senate reference* n 24 above, paras 51 and 55.

the SCC, the appointment of Senate members, rather than their democratic election, 'shapes the architecture of the *Constitution Act, 1867*'.<sup>92</sup> From a historical perspective, the founding fathers 'deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of «sober second thought»'.<sup>93</sup> Consequently, '[t]he framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives'.<sup>94</sup> In other words, the executive appointment of senators served the purpose to 'serenely revise legislation, away from all popular pressures'.<sup>95</sup> The other reason that explains executive appointment is linked to the idea that the Canadian upper chamber 'would be a *complementary* legislative body, rather than a perennial rival of the House of Commons in the legislative process'.<sup>96</sup> Not enjoying the same legitimacy stemming from popular elections, senators 'would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons'.<sup>97</sup>

In spite of the historical rationale summarized by the SCC, the executive appointment of senators in Canada has often been considered undemocratic and, consequently, contested. For this reason, the first question in the *Senate reference* asks whether the federal Parliament can unilaterally change this by creating

<sup>92</sup> *Senate reference* n 24 above, para 59.

<sup>93</sup> *Ibid* para 56.

<sup>94</sup> *Ibid* para 57. However, for some scholars, senatorial appointments are 'essentially partisan' and, in order to be appointed senator, 'it is usually necessary to be a member of the party in power'. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 342. Also, constitutional scholars such as Henri Brun, Guy Tremblay and Eugénie Brouillet argue that this type of senatorial structure is a legacy of the 'aristocratic type' of second chamber which, originally, was intended to express the views of a 'given social class'. As a result, the very fact that senators are not democratically elected implies that they are not subject to electoral pressures and, thus, they can participate to the legislative process in a more 'objective and serene' way. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 337.

<sup>95</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

<sup>96</sup> *Senate reference* n 24 above, para 58.

<sup>97</sup> *Ibid* para 58.

‘consultative elections to select senatorial nominees endorsed by the populations of the various provinces and territories’.<sup>98</sup> In other words, the proposed consultative elections discussed in the *Reference* would produce lists of candidates compiled through national or provincial and territorial elections so that the Prime Minister would consider them prior to making recommendations to the Governor General.<sup>99</sup>

However, based on the historical rationale detailed above, the SCC argues that senatorial consultative elections would alter the architecture of the Constitution by modifying the role of the Senate as a ‘complementary legislative body of sober second thought’.<sup>100</sup> In fact, by modifying the ‘constitutional architecture’, the role of ‘sober second thought’ of the upper chamber would be weakened; also, this would ‘give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design’.<sup>101</sup> Furthermore, consultative elections of Senate members would imply the subjection of Senators ‘to the political pressures of the electoral process’ and their endowment to popular mandate, thus transforming senators into ‘popular representatives’.<sup>102</sup> Consequently, although prime ministers could ignore election results, the proposed consultative elections ‘would amend the Constitution of Canada by changing the Senate’s role [...] from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy’.<sup>103</sup>

In any event, as recalled above, the role of the SCC in the *Senate reference* is not to ‘speculate on the full range of possible changes to the Senate’ but simply to ‘determine the legal framework for the specific changes’.<sup>104</sup> Consequently, the conclusion of the SCC on the first question is that consultative elections to nominate senators would bring a change to the architecture of the Canadian Constitution,

<sup>98</sup> Ibid para 49.

<sup>99</sup> Ibid para 65.

<sup>100</sup> Ibid para 54.

<sup>101</sup> Ibid para 60.

<sup>102</sup> Ibid para 61.

<sup>103</sup> Ibid paras 62 and 63.

<sup>104</sup> Ibid para 4.

and such an amendment would thus attract the general amending procedure of section 42(1)(b) of the *Constitution Act, 1982*.<sup>105</sup>

### **b. The Second Question: Senatorial Tenure**

The second question in the *Senate reference* concerns senatorial tenure: in particular, the SCC is asked if the federal Parliament can unilaterally (eg without provincial participation) ‘set fixed terms for Senators’.<sup>106</sup> In fact, under the present wording of section 29(2) of the *Constitution Act, 1867*, once appointed senators hold their place until the age of seventy-five.<sup>107</sup> As indicated by the SCC, the fact that senators are currently appointed ‘roughly for the duration of their active professional life’<sup>108</sup> serves the very purpose of allowing them ‘to function with independence in conducting legislative review’.<sup>109</sup>

Yet, as for the senatorial executive appointment discussed above, this characteristic of the Canadian Senate has not been exempt from criticism. For this reason, the federal Parliament proposed to replace senatorial life tenure with ‘fixed term’ tenure (see and Bill S-4 and Bill C-7). However, the SCC argues that transforming the current tenure with a fixed term would bring a ‘significant change’ to the nature of the Senate as ‘complementary legislative body of sober second thought’<sup>110</sup> as it would ‘offer a lesser degree of protection from the potential consequences of freely speaking one’s mind on the legislative proposals of the House of Commons’.<sup>111</sup> A change in the tenure would thus alter the role and nature of the Senate, and thus amend the Constitution.<sup>112</sup>

<sup>105</sup> Ibid para 70. For a detailed description of this amending formula, see n 87 above. The conclusion of the SCC on the first question contrasts with the argument made by the Attorney General of Canada, who submits that the implementation of consultative elections for senators does not amend the Canadian constitution or, if it does, the amendment can be achieved by the (federal) Parliament alone. See *Senate reference* n 24 above, paras 51-53.

<sup>106</sup> Ibid paras 2 and 49.

<sup>107</sup> Incidentally, this provision was enacted by the *Constitution Act, 1965*, S.C. 1965, c. 4, which came into force on 2 June 1965. The original section provided for life-tenure of senators.

<sup>108</sup> *Senate reference* n 24 above, para 79.

<sup>109</sup> Ibid para 79.

<sup>110</sup> Ibid paras 79 and 80.

<sup>111</sup> Ibid para 80.

<sup>112</sup> Ibid para 71.

The next step for the constitutional judges is to determine which amending formula should be appropriate to the change of senatorial tenure. The argument of the SCC is that, since the Senate ‘is a core component of the Canadian federal structure of government’ any change that affects ‘its fundamental nature and role engage the interests of the stakeholders in our constitutional design – ie the federal government and the provinces – and cannot be achieved by Parliament acting alone’.<sup>113</sup> The imposition of fixed terms is considered a change to the ‘fundamental nature and role’ of the Senate, thus requiring the general amending procedure.<sup>114</sup>

### **c. The Third Question: Senatorial Real and Personal Property Requirements**

The third question addressed to the SCC pertains to the removal of the personal wealth and real property requirements for senators: in other words, the issue is whether the federal Parliament can unilaterally (eg without provincial participation) remove the constitutional requirements that senators must own land worth four thousand in the province for which they are appointed (the ‘real property’ requirement) and have a net worth of at least four thousand (the ‘personal property’ requirement).<sup>115</sup>

The reasoning of the SCC on this issue, however, is limited to the amendment procedure to follow in order to change the aforementioned requirements; this is unfortunate, as it would have been instructive to learn more about the historical genesis and rationale of the ‘real property’ and ‘personal property’ prerequisites. In any event, the conclusions of the SCC is that a change in the ‘net worth’ or ‘personal property’ requirement is not seen as a modification of the Senate’s fundamental role as a ‘complementary

<sup>113</sup> Ibid para 77.

<sup>114</sup> Ibid paras 79 and 82. Once again, the conclusion of the SCC clashes with the positions of the Attorney General, who argues that changes in senatorial tenure would fall within the unilateral federal amending power contemplated in section 44 of the *Constitution Act, 1867*. See *Senate reference* n 24 above, para 72. See n 87 above for a description of these two amendment formulas.

<sup>115</sup> *Senate reference* n 24 above, paras 2 and 49. As noted above, the ‘real property qualification’ is spelled out in section 23(3) of the *Constitution Act, 1867*, whereas the ‘personal property qualification’ is enunciated in section 23(4) of the same *Act*.

legislative chamber of sober second thought<sup>116</sup> and it does not ‘engage the interests of the provinces’.<sup>117</sup> As a result, a federal unilateral amendment under section 44 of the *Constitution Act, 1982* is permitted.<sup>118</sup> As for the ‘real property’ requirement, the SCC argues that, while its removal ‘would not alter the fundamental nature and role of the Senate’,<sup>119</sup> it would do so with regards to Quebec senators only, thus attracting the ‘special arrangements procedure’ of section 43, *Constitution Act, 1982*, and requiring the consent of the sole Quebec’s National Assembly.<sup>120</sup>

#### **d. The Fourth Question: Procedure to Abolish the Senate**

The fourth and final question addressed to the SCC concerns the procedure to follow in order to abolish the Senate and, in particular, the degree of provincial consent required.<sup>121</sup> As happened with the previous question, the reasoning of the constitutional judges is limited to their role of determining ‘the legal framework for implementing the specific changes contemplated in the questions’<sup>122</sup> without discussing the historical foundations of a bicameral system and the advantages and disadvantages of abolishing one of the parliamentary branches. Once again, the SCC maintains that the abolition of the Senate ‘would fundamentally alter’ the Canadian ‘constitutional architecture’ as it would remove the ‘bicameral form

<sup>116</sup> *Senate reference* n 24 above, para 88.

<sup>117</sup> *Ibid* para 89.

<sup>118</sup> *Ibid* para 90. See n 87 above for a description of this amendment formula.

<sup>119</sup> *Ibid* para 91.

<sup>120</sup> *Ibid* para 91. In fact, as recalled above, pursuant to section 22 of the *Constitution Act, 1867*, ‘each Senator from Quebec is appointed to represent one of the province’s 24 electoral divisions’ and this was justified by the fact that it was necessary to ensure that ‘Quebec’s Anglophone minorities would be represented in the Senate, by making it mandatory to appoint Senators specifically for divisions in which the majority of the population was Anglophone’. See *Senate reference* n 24 above, para 92. Furthermore, section 23(6) of the *Constitution Act, 1867* provides some flexibility to Quebec’s senators as it allows them ‘to either reside in the electoral division for which they are appointed *or* to simply fulfilling their real property qualification in that division’ (*ibid*). This is why the SCC deems it necessary to have the consent of Quebec’s National Assembly to modify this requirement (*ibid* para 93). See n 87 above for a description of the amendment formula.

<sup>121</sup> *Ibid* para 2.

<sup>122</sup> *Ibid* para 4.

of government' instituted in 1867.<sup>123</sup> Also, the SCC clearly distinguishes between the abolition of the Senate and mere changes to it (eg its powers, the number of senators, etc): while changes to the Upper Chamber require a 'substantial degree of federal-provincial consensus',<sup>124</sup> the abolition of the Senate 'would alter the structure and functioning of Part V' of the *Constitution Act, 1982* which was 'drafted on the assumption that the federal Parliament would remain bicameral in nature' and is thus 'replete with references to the Senate'.<sup>125</sup> In fact, the Canadian Senate plays a key role in most of the amendment procedures contemplated in Part V of the *Constitution Act, 1982* and, as a result, a 'process of constitutional amendment in a unicameral system would be qualitatively different from the current process'.<sup>126</sup> Consequently, only the 'unanimous consent of Parliament and of all the provinces' could abolish the Senate.<sup>127</sup>

#### **e. The Upper House Reference and Concluding Remarks**

At the end of this review of the main points discussed by the SCC in the *Senate reference*, it may be worth noting that the questions addressed to the constitutional judges in 2013 were not entirely new. In fact, in 1980 the SCC was consulted to address similar queries, to which the constitutional judges answered in the *Upper House reference*.<sup>128</sup> More specifically, the questions asked were whether the Parliament of Canada (the federal parliament) had legislative authority to (unilaterally) abolish the Senate and/or to enact legislation 'altering, or providing a replacement for, the Upper House of Parliament'.<sup>129</sup>

Similarly to the approach displayed by the SCC in the *Senate reference*, in the *Upper House reference* the constitutional judges

<sup>123</sup> Ibid para 97.

<sup>124</sup> Ibid para 101. The reader would recall that, in order to bring changes to the Senate (ie powers, number of senators, etc) the procedure set forth in section 42 of the *Constitution Act, 1982* shall be followed (the '7/50' procedure).

<sup>125</sup> *Senate reference* n 24 above, para 106.

<sup>126</sup> Ibid para 110.

<sup>127</sup> Ibid paras 106 and 111. See n 87 above for a description of this amendment formula.

<sup>128</sup> Reference re Authority of Parliament in Relation to the Upper House, 1980 1 R.C.A. 54 (*Upper House reference*).

<sup>129</sup> Ibid 58, 59.

did not assess whether the Canadian Senate effectively played the role originally intended for it.<sup>130</sup> The SCC argued that the Senate played a ‘vital role as an institution forming part of the federal system’<sup>131</sup> to the point that its abolition ‘would alter the structure of the federal Parliament to which the federal power to legislate is entrusted’ although it would not ‘directly affect federal-provincial relationships in the sense of changing federal and provincial legislative powers’.<sup>132</sup> Furthermore, the SCC also emphasized how one of the purposes for the creation of the Senate was ‘to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation’.<sup>133</sup> Consequently, ‘[t]he power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons’ so that ‘the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process’.<sup>134</sup>

The *Upper House reference* was issued in 1980 before *patriation*: consequently, the various amending procedures contained in Part V of the *Constitution Act, 1982* were not available. Yet, the conclusions reached by the SCC were not dissonant from those of the *Senate reference*, in the sense that, even in 1980, the SCC considered that ‘the federal parliament alone could not alter the intentions of the Founding Fathers of Confederation at this regard’.<sup>135</sup>

### III. A Comparison between Canada and Italy. Conclusion

This paper took as its point of departure the seminal constitutional reform recently approved by both Houses of the Italian Parliament in their first reading to show the topicality, in comparative perspective, of the debate ongoing in Italy. In fact, I illustrated how, in Canada, the Senate (or Upper Chamber) has historically been a

<sup>130</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

<sup>131</sup> *Upper House Reference* n 128 above, 66.

<sup>132</sup> *Ibid* 65 and 66.

<sup>133</sup> *Ibid* 67.

<sup>134</sup> *Ibid* 68.

<sup>135</sup> H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

rather contested institution, attracting criticism and unsuccessful attempts of reform. The *Senate reference* issued by the SCC in 2014, and detailed in this contribution, thus offers an ideal foundation to identify analogies and differences between the Italian and the Canadian experiences and conclude on potential shortcomings of the Italian reform.

### 1. Italy and Canada in Comparative Perspective

Italian jurists seldom look at Canadian federalism for comparison or inspiration: after all, a comparison between Italy and Canada could appear rather improbable at first sight, since Canada is a typical example of a (quite decentralized) *pure* or *classic* federation, while Italy could be regarded as a model of regional state at the most. Yet, despite the profound differences in the genesis and trajectory followed by Canadian federalism (as opposed to Italian regionalism), the institutional and political debate on the Senate reform presents surprising analogies and points of convergence that are worth, in my opinion, a closer scrutiny.

The perfect bicameral system that has singled out Italy throughout its republican history (and currently subject to revision) shares an interesting similitude with Canada. In fact, in both countries, the original intention of the constitutional framers was to establish a bicameral model where both branches would have almost identical powers, but where one of them (the Senate or Upper Chamber) would serve as chamber of ‘sober second thought’ (in Canada) or ‘careful consideration or wisdom’<sup>136</sup> (in Italy), as evidenced by the executive appointment of Canadian senators and by the more stringent age requirements to vote for, and be elected at, the Italian Senate.<sup>137</sup>

The constitutional text currently in force in Italy allows us to make another parallel between the Italian Senate and the Canadian counterpart, as senatorial election or appointment follows a geographical element. In fact, Italian senators are now elected on a regional basis, and seat distribution among regions is proportional to local population, whilst Canada is subdivided into four divisions with

<sup>136</sup> Ibid 337.

<sup>137</sup> See n 6 above.

equal representation of senators.<sup>138</sup> Yet, neither in Italy nor in Canada senators represent local interests, as the geographic allocation merely serves electoral purposes. This aspect is particularly controversial in Canada, as it is a federal state: in fact, *federal* Upper Chambers are usually intended to offer a venue for constituent units to participate and be represented at central level, but in Canada the Senate has with time transformed into a venue expressing Canadian pluralism only. As for Italy, regional representation at the centre has become an issue only after the strengthening of Italian regionalism with the constitutional amendments of 2001: the reform under discussion, proposing to transform the Senate into a chamber representing local autonomies, shall be seen as an evolution of, and adaptation to, the new regional model.

Moving now to the specific changes contained in the constitutional reform discussed in Italy, we have already noted how it will drastically reshape the nature, functions and composition of the Senate in a number of ways. First, the universal and direct suffrage presently sanctified by Art 58 para 1 Constitution will be replaced by regional appointments of senators, so that the Senate could better fulfil its new role of territorial chamber. At this regard, however, constitutional scholars have raised various concerns: some theorists argue that a repeal of the universal and direct suffrage is unconstitutional, as the vote is a fundamental principle enshrined in the Italian Constitution.<sup>139</sup> Similarly, regional appointment of senators implies that the legislative function will be exercised by individuals who are not democratically elected and, consequently, who are not directly accountable towards the peoples.<sup>140</sup> Furthermore, scholars have also questioned the aptness of future senators to effectively carry out their senatorial tasks, especially with regards to their suitability to 'be adequately equipped to discuss the implications of constitutional reforms or of the new policies of the European Union'<sup>141</sup> and how Senate members will be able to divide

<sup>138</sup> See Arts 57 para 1 and 57 para 4 Constitution (for Italy) and section 22(1), *Constitution Act, 1867* (for Canada).

<sup>139</sup> A. Pace, 'I rischi del nuovo Senato' (2015) available at <http://www.osservatorioaic.it/01-2015.html> (last visited 8 October 2015).

<sup>140</sup> *Ibid.*

<sup>141</sup> G. Della Cananea, n 1 above, 7.

their tasks between regional and national engagements.<sup>142</sup> In this sense, the new regional appointment will resemble the executive appointment of senators in Canada, where the ‘democratic deficit’ of the Senate represents a rather thorny issue. As pointed out by the SCC in the *Senate reference*, the executive appointment of senators allows the Upper Chamber ‘to play the specific role of a complementary legislative body of ‘sober second thought’<sup>143</sup> and to ‘endow the Senate with independence from the electoral process to which members of the House of Commons were subject’<sup>144</sup> so that senators ‘would not have the expectations and legitimacy that stem from popular election’.<sup>145</sup> In other words, the gist of the SCC message is that senatorial executive appointment is deeply rooted in the original constitutional design. Conversely, in Italy the framers of the 1948 Constitution opted for the universal and democratic suffrage to elect the members of both the Chamber of Deputies and of the Senate. Borrowing the same words used by the SCC, we can perhaps say that the direct election of senators ‘shapes the architecture’ of the 1948 Italian Constitution. The experience with indirect senatorial appointment in Canada may suggest that it would have been preferable to maintain a democratically elected senate. Thus the objective of having a chamber representative of the interests of regions and other local autonomies could have as well been attained by preserving the direct election of its members.

Along with proposals to reform the Senate, it is interesting to note that both in Italy and Canada suggestions were made to abolish this institution. In Italy, for example, Lorenza Violini recalls how ‘[t]he issue of keeping bicameralism or translating to unicameralism has deep roots dating back to the very dawn of our republican history’<sup>146</sup> and, more recently, the Commission for constitutional reforms appointed by Giorgio Napolitano in 2013 to assist the cabinet in the institutional reform proposed a unicameral model for Italy, later rejected.<sup>147</sup> Giacinto Della Cananea further indicates that, at

<sup>142</sup> Ibid 7; A. Pace, n 139 above.

<sup>143</sup> *Senate reference* n 24 above, para 56.

<sup>144</sup> Ibid para 57.

<sup>145</sup> Ibid para 58.

<sup>146</sup> L. Violini, n 23 above, 33-34.

<sup>147</sup> Ibid 34. For additional views on the pros and cons of a ‘monocameral’ option,

European Union level, only thirteen out of twenty-eight countries have an upper chamber and only five of them are directly elected by citizens.<sup>148</sup> As for Canada, we noted how there is a certain aversion, especially at provincial level, towards a bicameral system, as many feel that an Upper Chamber styled the Senate is unnecessary. It is unquestionable that persuasive and convincing arguments can be made both in favour and against bicameralism, but if the main purpose of a Senate is to offer a venue to local autonomies to be represented at central level, then bicameralism becomes inevitable (although other forms of coordination between the centre and the periphery could be perfected).

## 2. Conclusion

When finally approved, the overarching constitutional reform discussed in Italy will potentially transfigure (among other things) the role, nature and composition of the Senate, mainly by relinquishing its historical role of second House mirroring the functions of the Chamber of Deputies elected by universal and direct suffrage and becoming the parliamentary branch, regionally appointed, that represents the interests of local autonomies at the centre. This amendment will allow the Senate to adapt to the changed dynamics in the centre-periphery relationships introduced with the 2001 constitutional reform. Certainly, the timing chosen to introduce a *regional* Senate (for a long time invoked as the missing ring in the chain of reforms preceding and following the 2001 constitutional amendment) is quite puzzling, as it happens at a time when Italian regionalism has entered into a strong centripetal trend.<sup>149</sup>

In conclusion, the purpose of the parallel between Canada and

see also M. Luciani, 'La Riforma del Bicameralismo Oggi' *Rivista dell'Associazione Italiana dei Costituzionalisti*, 5-6 (2014).

<sup>148</sup> G. Della Cananea, n 1 above, 6.

<sup>149</sup> Similar concerns are shared, among others, by F. Gabriele, 'Il regionalismo tra crisi e riforme costituzionali' *Rivista dell'Associazione Italiana dei Costituzionalisti*, 9 et seq (2014). While this contribution decided to focus specifically on the aspects of the reform pertaining to the Senate, the reform itself will have the potential to redefine Italian regionalism by eliminating the shared legislative competences between the centre and the periphery (Art 117 Constitution), among other things.

Italy on the Senate reform sketched in this contribution was to show the similarity of many issues revolving around the nature, role and especially composition of the Senate, notwithstanding the obvious differences between the two legal systems. Among other things, we can speculate that issues analogous to those emerged in Canada will be advanced in Italy once the reform will be finally approved.