I.- COURSE OUTLINE

The course comprised two clearly distinct parts.

In the first place, a theoretical part designed to provide general information on the overall system of administrative justice in Italy, and covering its history, present-day structure and main regulatory standards, and other details relating more specifically to the Consiglio di Stato (CdS), in order to explain the most important aspects of its two current roles, consultative and judicial.

In the second place, a practical part involving attendance at the various sessions of the different CdS consultative and judicial Sections.

The duration of the course was two weeks (from the 19 - 29 November 2018); with four sessions per day during this period, arranged so that part of the time was devoted to receiving theoretical information and another part to attending hearings and deliberations taking place in the relevant Sections, consultative or judicial.
These sessions were held in the following CdS Sections:

- in the Special Consultative Section, which deliberated upon the opinion requested of it by the ‘Autorità nazionale anticorruzione’ relating to modification of the ‘Regolamento per il rilascio dei pareri di precontenzioso al sensi dell’art. 211 del decreto legislativo 18 aprile 2016, n. 50’;

- in Consultative Sections I and II, which deliberated upon the opinion to be pronounced with regard to extraordinary challenges;

- in Judicial Sections III and V, which held public hearings on the appeals lodged against decisions relating to protective measures and against judgements.

II.- THE HOST INSTITUTION : THE “CONSIGLIO DI STATO DELLA REPUBBLICA ITALIANA” (CdS)

1.- Brief history of the CdS and of the establishment of Regional Administrative Courts (RACs);

(A) The CdS was created in 1831 by the King of Piamonte Cerdeña, Carlos Alberto, when Italy was not a single State, being divided into ten or so small territories, and it should be emphasized that when created the CdS was the Council of the King of Piamonte Cerdeña. Thus it was created as an institution before the existence of the current institutions of the Italian Republic. When the Consiglio di Stato was created, its role was purely consultative, with a judicial role introduced at a later point, towards the end of the 19th century.

(B) After the unification of the Italian State (1861), the CdS became a consultative body for the new Kingdom of Italy.

In 1865 (with Law 2248/1865) the judicial courts, with jurisdiction over administrative decisions, were abolished and thus Italy was without any system of administrative justice.

(C) It was in 1889 that new judicial functions were attributed to the CdS. The creation of the fourth Section of the CdS brought into being the first of the Sections to be configured as a judicial, rather than consultative, Section. More specifically, Law 5992/1889 attributed judicial decision-making powers to the CdS under the following terms:
- the condition of a legitimate interest vis-à-vis the actions of the public administration had to be met, and
- the objective had to be annulment of its illegal actions.

With regard to the attribution of judicial functions to the CdS two aspects should be emphasized:
- it was in 1889 that the judicial system of administrative justice was created in Italy;
- the judicial Sections of the CdS were created around that date: the fourth Section in 1889; the fifth Section in 1907; the sixth Section in 1942, and the third Section in 2011 (transformed from a consultative section into a judicial section, which is why it is the most recent of the judicial sections).

(D) During the period of the 1946 Constituent Assembly attempts were made to abolish the CdS, but it was finally decided to confirm its existence. A significant factor in this decision was its strong sense of independence (in particular during the fascist period).

The 1947 Constitution confirmed its status as an independent or autonomous body for administrative justice, and also its dual function as higher consultative body and an Italian High Court for Administrative justice.

(E) In 1971 (Law 1034/1971) the Regional Administrative Courts (RACs) were created, and afterwards the CdS became principally a Court of Appeal, demonstrating that in the area of administrative justice there are two judicial levels or instances (unlike with civil justice, where there are three judicial stages).

2.- Constitutional provisions concerning the Council of State

These are contained in articles 100, 103, 111 and 113 of the 1947 Constitution of the Italian Republic, and the main ideas may be summarized as follows:

- Its function is two-fold: consultative (for the Government and the Public administrations) and judicial (with judicial oversight of the legality of the actions of state authorities).

- In spite of this dual nature, its members have a degree of functional independence and autonomy, characteristic of the judicial bodies of the State.
The CdS is the Supreme court for administrative justice and its decisions may only be challenged before the procedural appeals court in highly exceptional cases (in which a possible lack of jurisdiction is raised).

Its main and ultimate objective, for which it carries out these two functions, is to ensure the validity of the rule of law in all activities of the public Administration.

3.- General configuration of the judicial bodies forming the present-day system of administrative justice in Italy.

From this historical background have emerged two types of judicial body: firstly the judicial sections of the CdS and secondly the RACs (created in 1971, as indicated above), which represent two separate judicial instances or stages.

III.- LAW OF THE HOST COUNTRY

The main sets of rules governing the Italian State that have to be taken into account in their relation with the subject matter of the course and the experience obtained in the CdS are as follows:

- Section IV ‘The magistrature’ (articles 101 - 113) of the Constitution of the Italian Republic dated 27 December 1947, which contains the general constitutional provisions on judicial power in Italy, as well as the provisions directly concerning the Consiglio di Stato (CdS) and the general Italian system of administrative justice.

- The Code of administrative justice, which lays down the regulations governing the procedures to be followed by the CdS when it carries out its judicial functions.

- The D.P.R. dated 24 November 1971, n. 1199, on the simplification of the procedure for administrative recourse, which governs extraordinary recourse before the President of the Republic, for which the decision is adopted by presidential decree in accordance with the opinion pronounced by the CdS.

- The Law passed 7 August 1990, n. 241 (new standards applicable to administrative procedure and right of access to administrative documents).
IV.- THE ‘COMPARATIVE LAW’ ASPECT OF THE COURSE

In this section I shall compare the systems of administrative justice currently in force in the Republic of Italy and in the Kingdom of Spain.

When presenting a detailed explanation, a distinction must be made between elements relating to ‘the organization of administrative justice’, to ‘law as applied’ (in both procedural and substantive terms), and to ‘judicial practices’.

1.- The organization of administrative justice

An overview of the organizational structure of the system of administrative justice in the Italian Republic reveals certain differences. Thus in Italy, unlike in Spain, administrative justice has its own organizational structure and is not included in the organizational structure encompassing the bodies with ordinary jurisdiction in civil and criminal matters.

However this characteristic does not in itself mean that the bodies dispensing administrative justice in Italy (the CdS and the RACs) are lacking, by comparison with the other state authorities and when exercising their judicial functions, in the essential independence and operational autonomy required for the existence of a genuine judicial power, as confirmed by the provisions of the 1947 Italian Constitution as it relates to the abovementioned bodies of administrative justice.

This results in the first place from article 100, instituting the Council of State as a guarantor of justice in the Administration, as well as a judicial-administrative body with a consultative purpose.

And this results very specifically from articles 103, 111 and 113, all within Section IV ‘La Magistratura’; i.e. in the section that defines the rules governing the of the function judicial exercised by ordinary judges.

In these latter articles the following points should be noted:

- article 103 stipulates that the Council of State and the other bodies of administrative justice hold jurisdiction to protect, vis-à-vis the Administration, legitimate interests (and also individual rights in areas stipulated by the law);
- article 111 only allows appeal on points of law against the decisions of the Council of State for reasons of jurisdiction;
- and article 113 covers ‘judicial protection’, vis-à-vis actions by administrations, which takes the form of actions before ordinary judicial bodies and before administrative judicial bodies.

In conclusion, with regard to the configuration of administrative justice as a genuine judicial power, with constitutional and legal status providing independence from the rest of the State’s powers, the Italian Republic’s system of administrative justice does not differ to any significant degree from the model for judicial litigation of an administrative nature set out in the 1978 Spanish Constitution.

In both States, the bodies shaping administrative justice form a part of the judicial power to the same extent as the courts with ordinary civil or criminal jurisdiction, and its distinctiveness does not arise from its independent status (which is identical to that of a civil judge), but rather from the specialist areas of its objective field of knowledge.

2.- Formal or procedural law.

With regard to the law applicable in Italy to the procedure to be applied for actions against the administration and to the procedures governing judicial actions before bodies dispensing administrative justice, this is notably shaped by the three sets of rules referred to above, which may be analyzed as follows:

(A) The new text relating to administrative procedure and the right of access to administrative documents (Law passed 7 August 1990, n. 241).

It should be pointed out that this text is very similar, in conceptual terms, to the Spanish regulations on the administrative system and procedure, and in particular that what differences there are arise from the structural context in which the areas regulated are situated.

Evidence of this follows, with reference to the chapters of the text and to the main aspects thereof.

Thus chapter I, which deals with the principles of administrative activity, includes the principles of economy, efficacy, impartiality, publicity and transparency; it also covers administrative motivation, when this is required, and what the content thereof must be, and declares that the Administration shall encourage use of data transmission systems.
Chapter II stipulates the party responsible for overseeing the procedure. Chapter III defines the parties entitled to participate in the procedure, considering both those with public or private interests and the associations created with regard to common interests.

Chapter IV, which deals with administrative simplification, regulates failure by authorities to respond. With their view of effects and exceptions, the ideas set out in this chapter are very similar to those of the Spanish system.

Chapter IV-a, which deals with efficacy, invalidity and cancellation, contains categories or concepts that are strikingly similar to their Spanish counterparts.

Articles 22 et seq set out the right of access to administrative documents.

Finally, chapter VI defines the scope of application of the law, covering the State Administration, national public bodies and companies that are wholly or largely publicly owned, stipulating that regional authorities and local bodies cannot, in procedures for which they have jurisdiction, offer inferior guarantees in certain areas.

While the areas listed are framed in a different manner, they are included in Spanish regulations of law 39/2015 passed 1st October, regarding the common Administrative procedure for Public administrations.

(B) The D.P.R. dated 24 November 1971, n. 1199, on the simplification of the procedure for administrative recourse actions

In each of its three chapters, this sets out a different form of administrative recourse action. Chapter I covers hierarchical recourse, against actions by administrations, which are not definitive, to higher authorities. Chapter II sets out recourse ‘in opposizione’ which, in the legally stipulated cases, may be submitted to the body that pronounced the decision under challenge. Finally chapter III provides for extraordinary recourse that may be submitted to the President of the Republic, whose decision is adopted by presidential decree, following proposal by the relevant ministry in accordance with the opinion pronounced by the CdS.

The regulations governing this extraordinary recourse stipulate that:

- It may target definitive actions by administrations that have not been challenged by judicial means.

- It includes a phase, prior to the trial, which is the responsibility of the corresponding ministry, during which the parties whose interests are affected by the recourse have a right to object.
- After this preliminary phase, the recourse is referred to the Council of State for its opinion.

- There follows a final decision-making phase, and the decision is adopted by Decree of the President of the Republic following proposal by the relevant ministry ‘conforme al parere del Consiglio di Stato’.

- The decree issued by the President of the Republic deciding upon the extraordinary recourse may be challenged by judicial review in the cases stipulated in article 395 of the ‘Codice of civil procedure’.

The characteristics of this extraordinary recourse, which are covered by the above regulation, may be summarized as follows:

- It is a means of challenging the actions of administrations as an alternative to judicial recourse, allowing the interested party to select a more agile and economical course of action than judicial procedure.

- And, while it resembles administrative recourse, in reality it constitutes an instrument of challenge, with the same characteristics of independence and technical solvency as judicial recourse. This is a consequence of the involvement of the CdS, whose opinion forms the basis for the decree issued by the President of the Republic that settles the dispute.

(C) The Code of administrative justice, approved by legislative decree dated 2 July 2010, n. 104

This sets out, as stated above, the regulations governing the procedures to be followed by the CdS when carrying out its judicial functions.

For the purposes of comparison with the equivalent Spanish regulations (Law, 29/1998, dated 13 July, relating to judicial litigation of an administrative nature - LJCA -) there follows a summary of its structure and of the main contents of its five books.

It comprises five books, the main contents of which are as follows:

- The first book covers the bodies with administrative jurisdiction; the parties to the procedure and their representation and defence; the actions and claims that may be submitted, and the judicial decisions.

- The second book lays down first-instance administrative procedure.

- The third book deals with judicial remedies.
The fourth book refers to the ‘giudizio de ottemperanza’ and special procedures.

Lastly, the fifth book contains the final sets of rules, of which the two most important are the one governing subjects within the exclusive jurisdiction of the administrative courts and the one governing subjects within a broader jurisdiction covering the merits of the case.

There follows a necessarily brief comparison with the corresponding Spanish regulations with a view to setting out the main differences between them and the Italian code.

(i) Organizational structure of Italian administrative justice

This is made up of the two kinds of judicial body mentioned above: the Regional Administrative Courts and the Council of State.

The former act as first-instance bodies and the latter as a supreme body, with the main role of hearing appeals against decisions pronounced by the RACs.

There is also provision for appeals on points of law against decisions by the CdS, which are submitted to the procedural appeals court and are admissible exclusively for issues of jurisdiction.

The above arrangement differs from the Spanish organisation in the following ways:

In Italy there are only two kinds of judicial body, while in Spain there are territorial or central courts, territorial chambers and the Audiencia Nacional and the third chamber of the Supreme court.

In Italy there are only two levels or phases of procedure: first instance and appeals (mention has already been made of the exceptional and restricted nature of appeals on points of law), contrary to the practice in Spain, the procedure consists of three phases: first instance, appeal, and appeal on points of law.

(ii) Actions by the public Administration that can be challenged by judicial means

The combined application of the provisions of article 100 of the Italian Constitution and article 7 of the Code of administrative justice means that in Italy no actions by administrations escape judicial control.
The differences with Spain in this area are as follows: in Italy actions derived from the exercise of political power are not under any circumstances subject to judicial recourse (article 7.1 of the Code), and there is no legislation specifically regulating corresponding actions (although there is a guardianship procedure to counteract administrative inertia).

(iii) Forms of action that may be taken

Account should notably be taken of the following three provisions of the Italian Code: firstly article 7, which enables legal action to be taken before bodies of administrative justice, generally speaking, by those with legitimate interests in the matters, and only under specific legally established circumstances by those who assert individual rights; and secondly articles 29 and 30, which respectively provide for two forms of procedural action before bodies of administrative justice: action for annulment and action to obtain conviction.

Thus an assessment may be made of similarities between the ways in which permission is granted in Italy and in Spain to submit to bodies of administrative justice objective actions for annulment and full-jurisdiction actions intended to restore the individual legal status affected by the action against the administration suffering annulment.

The differences arise from the fact that in Spain full-jurisdiction actions are not restricted, contrary to the situation in Italy.

(iv) Regulation governing the procedures to be followed by the judicial bodies of the administrative justice in Italy

In Italy as in Spain, there is a considerable body of regulations covering first-instance procedure and a separate body of regulations covering appeals.

(v) Special procedures

The Italian Code also provides a separate arrangement for specific procedures, described as ‘special’, which do not correspond to those defined under Spanish judicial law as ‘special’.

These are included in the fourth book of the Code, which in addition to ‘giudizio de ottemperanza’ (designed to ensure enforcement of judicial
decisions endowed with 'res judicata' status), comprises: ‘riti speciali’ relating to access to administrative documents; guardianship to counteract inertia on the part of the public Administration; the ‘ingiunzione’ procedure; summary proceedings for special disputes, and litigation proceedings relating to elections.

(vi) Judicial remedies

Article 91 of the Italian Code lists the judicial remedies: appeal proceedings, judicial review; third-party proceedings and appeal on points of law.

The main differences between the contents of this list of remedies and the Spanish system are:

1. in Italy there are specific regulations governing the procedure to rectify the situation of any party suffering the effects of a judgement pronounced with regard to a case in which they did not appear (in Spain there is no direct regulation, although the situation can be rectified by other procedural means), and

2. appeals on points of law may not be used in disputes on the merits of a case but merely for questions of jurisdiction.

3.- Substantive law

My observations in the hearings I attended during the two weeks of the course, carried out in the various Sections of the Cds, both consultative and judicial, confirmed that in terms of substantive administrative law we have a common culture with identical principles and concepts, and I also concluded that practice in terms of application and interpretation is also basically similar.

With regard to these parallels, the following points should in particular be noted:

- In Italy as in Spain, there is concern around the subject of 'discretionary powers', and in particular a focus on setting genuine limits in two areas: (1) to avoid encroaching on or usurping the specific assessment role of the Administration, and (2) to prevent this legitimate 'freedom of estimation' being a pretext for sidestepping the judicial structure and its principles.

In both countries, there is a shared desire to establish equilibrium, leading to the application of identical control techniques, which have for a number of
years been recognized under the doctrine of European administrative law (decisive factors, elements regulated, general legal principles, etc.)

- There is also common judicial practice in Spain and in Italy with regard to disputes relating to the concept of ‘technical discretion’, with a ‘double trigger’ approach: (i) a judicial body does not replace an expert with regard to specialist knowledge, and (ii) the technical aspect of the administrative decision does not give rise to a misuse of administrative authority, which could lead to discriminatory decisions or disregard for other legal principles (such as merit and aptitude).

These risks are addressed through a requirement upon the bodies carrying out technical assessments to provide explanations indicating: (1) the concrete subject being assessed, (2) the criteria or standards used for technical assessments and (3) the reasons why, in a concrete case, these criteria are applied to the individual selected by the Administration in a preferential manner.

And this technical discretion doctrine is applied to the procedures governing the selection of public employees and to the choice of winners in public tendering procedures.

- There is a conviction common to Italian and Spanish judicial practice that ‘Administrative law’ is ‘the ordering of a special aspect of Law, public Administration’, which is special due to the importance of general interests to society, given that the purpose of administrative law is the furthering of general interests; and one may also note a common emphasis on identifying, in each administrative dispute, the concrete public interest arising from the action taken against the administration under challenge.

Nor is the area of ‘protective measures’ marked by differences: the ‘periculum in mora’ and the ‘fumus boni iuris’ are criteria used in order to decide whether a measure is applied, and the most important concern in each individual case is to identify the individual need or interest jeopardized in the absence of the protective measure.

4.- Judicial practices.

On the basis of my observations at the hearings in the various Sections of the CdS, I would also like to make a distinction between the deliberation process (in the judicial and consultative Sections), and the hearing (in the judicial Sections).
- Observing the *deliberation* processes in situ I noted considerable similarities between the Italian and Spanish practices.

The President oversees discussions with a great degree of flexibility, merely ordering contributions to enable equal participation by all members of the judicial body; and also allows interruptions or replies from one judge to the other when examination of the subject under consideration would be of interest in enriching the debate and reflection that will lead to the final decision.

- With regard to *hearings*, the experience was particularly useful and enlightening, as in Spain hearings have only been held since implementation of the new system of procedural appeals (2015).

And I would like to highlight the following extremely positive aspects:

There is an atmosphere of extraordinary cordiality, among the judicial operatives, on the part of all participants in the court, and also on the part of the court vis à vis all the participants.

This cordiality does not preclude a profound respect for the President of the court, which takes the form of unfailing compliance with his or her instructions and orders.

In verbal statements, there is an emphasis on concision, as it is universally agreed that the main claims are to be made in writing, with the hearing only to be used for emphasizing the essential points of the claims and to allow the court to seek those explanations and clarifications that it considers to be of use in ruling on the case.

One may also note that the judicial operatives appear duty bound to collaborate with the court, taking on board the suggestions made regarding progression of the procedure (with possible suspensions and new scheduled dates).

V. THE EUROPEAN ASPECT OF THE COURSE.

The European component is present in the various Sections of the CdS (both consultative and judicial) in two ways.

In the first place there is a special awareness ensuring scrupulous respect for human rights when they are relevant in actions against the administration being challenged, and consideration for human rights is set out within the legal doctrine of the European Court of Human Rights.
In the second place, there is also frequent application of the Law of the European Union, especially in two specific areas: public employees, where reference is made to Directive 1999/70/CE issued by the Council on 28th June 1999, concerning the CES, UNICE and CEEP framework agreement on fixed-term employment; and public contracts, an area in which reference is made to, and application made of, the corresponding Directives and the legal doctrine of the Court of Justice the European Union relating to said Directives.

VI.- THE ‘GOOD PRACTICE’ ASPECT OF THE JURISDICTIONS VISITED.

The similarities between Italian and Spanish judicial culture and practices, which arise from the factors set out above, makes it impossible to specify distinctive features in Italy that must be imitated or introduced in Spain.

The sole exception arises from the way in which hearings are held in Italy. Such procedural activities are more frequent under the new Spanish system of procedural appeals, hence the need to imitate in Spain the Italian procedure for verbal contributions, with its flexibility, concision, cordiality and respect among participants.

VII.- BENEFITS DERIVED FROM THE COURSE.

I found the confirmation of belonging to a common judicial culture, and observation of essential resemblances when identifying the main problems arising from the activities of public Administrations, requiring heightened efforts in judicial control by the bodies of administrative justice, to be particularly positive.

These two aspects demonstrate that the European Union is a reality based upon common culture and sentiments, binding its member States.

In support of this declaration I wish to reiterate the observation I made above: that application of the judicial system of the European Union and of the case law of its Court of Justice is a frequent practice during the day to day activities of the courts in the various member States.
VIII.- SUGGESTIONS.

The course was so positive that it is difficult to present suggestions for its improvement.

The duration was just right, and the friendliness and cooperation displayed by the host institution could not have been better.

All I can suggest is that, in order to facilitate drafting of the final report and to ensure that maximum benefit is derived from the course, the host institution could provide, some time before the course, information regarding the institution and the main legislative texts governing its activity.