The discussion of the issues raised over the last years or so has been bedevilled by a failure on the part of some commentators to analyse and understand certain basic concepts. The most important of these is the term, “Devolution Issues”, which originates in section 98 and is defined in Schedule 6 (Part 1) of the Scotland Act, 1998.

The term “devolution issue” was invented to mean an issue arising from and consequent upon the devolution settlement contained in the 1998 Act. What the 1998 Act did was to create a Scottish Parliament, and a Scottish Executive with “members”, i.e. ministers of what is now the Scottish Government. The powers and competences of that Parliament, that Executive and those ministers were limited to those specified in the Act. (Lawyers use the term vires to describe those powers and competences: so if a minister purports to act in a way that the 1998 Act does not empower him to do, he is said to act ultra vires). The courts were given the task of deciding whether or not an act by a minister of the Scottish Executive, or an enactment by the Scottish Parliament was ultra vires.

Accordingly the term "devolution issues" properly relates to disputes as to whether or not the minister or Parliament is properly exercising a power conferred by the Scotland Act 1998. And section 57(2) of that Act provides that Scottish ministers have no power to do anything that is “incompatible with any of the Convention Rights or with community law”.

But confusion has arisen because, by amendments to the 1997/8 Scotland Bill, the Lord Advocate’s functions as head of the system of criminal prosecution in Scotland were treated as if the Lord Advocate, as public prosecutor, was exercising devolved functions. That was, and is, constitutional nonsense.

The true position was identified with complete clarity by Sir David Edward’s Expert Group, paras. 4.20 – 4.28. Two paras. from it are quoted here:

“4.21. Before devolution, it was recognised that the functions of the Lord Advocate in relation to the initiation and conduct of criminal prosecutions were quite distinct from his ministerial responsibility to Parliament. In that capacity, the Lord Advocate was, and still remains, “Her Majesty’s Advocate”. The Lord Advocate’s “retained functions” are so classified by the Scotland Act [section 52(6)] precisely because they are not functions conferred by the Act nor part of the devolution settlement.

4.22. It is therefore, in our opinion, constitutionally inept to treat the acts of the Lord Advocate in respect of her retained functions as raising a "devolution issue". As we have noted, this is a consequence of the wording of the Act, but there is no good reason why this constitutional error, or the problems that flow
from it, should be perpetuated. This cannot conduce to the good reputation of the Scottish legal system or that of the United Kingdom as a whole.” (emphases added).

To put it shortly, the 1998 Act erroneously classified issues about the compatibility – with the Convention - of the Lord Advocate’s exercise of prosecution functions as "devolution issues" to be dealt with in the same way as *vires* issues. In truth those were issues arising under the Human Rights Act 1998, notably Section 6, not "devolution issues", not *vires* disputes.

This drafting error was compounded by restricting the courts’ right to intervene to those cases where the incompatibility with the Convention was alleged to have resulted from “an act of the Lord Advocate”. This meant that if the incompatibility was alleged to be perpetrated by a court, the police, or the prison authority or any other “public authority” the courts had no power to intervene: this led to the Scottish courts having to decide that every alleged incompatibility that was discovered in criminal proceedings had to be treated as caused by an “act of the Lord Advocate”.

One example may help to illustrate a bizarre consequence of these errors. The acts of Directors of Public Prosecutions in England, Wales and Northern Ireland are not "devolution issues": so their ‘acts’, even if deemed “incompatible”, are not rendered *void*, as are the acts of the Lord Advocate. They fall under Section 6 of the Human Rights Act and are dealt with entirely differently. And the criminal cases in which they occur cannot be dealt with in the Supreme Court unless the ‘apex’ court certifies that the issue is one that raises a point of law of general public importance.

This failure -exposed by Sir David Edward - to appreciate the constitutional and drafting error vitiates the submissions of those (including the Faculty of Advocates: cf. para. 17) who suggest that the same regime governing "devolution issues" applies to the other devolved administrations. Thus in *The Government of Wales Act 2006, Schedule 9* the definition of "devolution issues" is essentially different: "devolution issues " do not include alleged Convention incompatibility perpetrated by any public prosecutor. The position is exactly the same in the Northern Ireland Act 1998. There has, of course, been no devolution to England. The true position is therefore this: that the only public prosecutor in the UK whose “acts” in criminal proceedings can be treated as giving rise to "devolution issues" is the Lord Advocate of Scotland. Elsewhere, if the concept of "devolution issues" is applicable, it relates to the *vires* of legislative bodies or of ministers exercising function other than prosecution functions.