

Interception Legal Landscape & Bird & Bird

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ISPA RIPA Event

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RIPA and friends

Regulation of Investigatory Powers Act 2000

- Warranted interception
 - Internal
 - External (certificated)
- Acquisition of communications data
 - Authorisation to obtain
 - Power to demand from CSPs by notice

Security Service Act 1989/1996, Intelligence Services Act 1994

- Functions; warranted surveillance

S.94 Telecommunications Act 1984

- SoS power to give general or specific directions to public telecom operators

Data Retention Directive/Regulations

- Status?

RIPA – no-one ever said it was easy

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2003 "We have found RIPA to be a particularly puzzling statute"
R v W (Court of Appeal)

2004 "longer and even more perplexing" than the "short but difficult" IOCA 1985. Lord Bingham, *A-G's Ref (No 5 of 2002)*

2005 "this impenetrable statute ... one of the most complex and unsatisfactory statutes currently in force." Prof. David Ormerod

2006 "a complex and difficult piece of legislation" Mummery LJ
(President of the IPT)

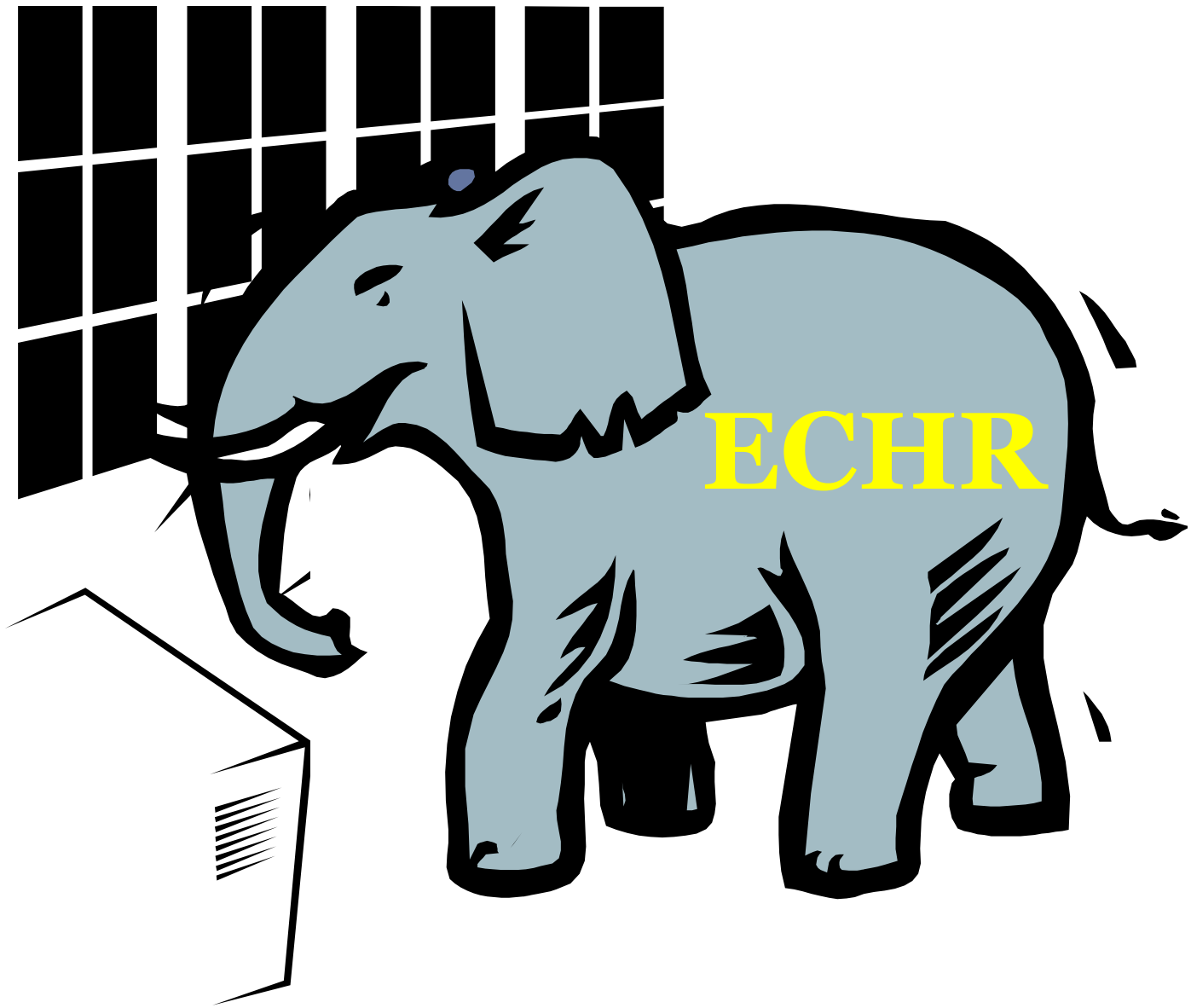
2013 "I do not think the ordinary person or Member of Parliament would be able to follow the Act without a lawyer" Sir David Omand, former Director of GCHQ

2014 "RIPA 2000 is a difficult statute to understand" Sir Anthony May, IOCC Report 2013

How did it get like this?

"Parliament has never sought to provide any coherent structure to [interception] legislation, but rather to respond incrementally by rectifying the deficiencies exposed by successive adverse European Convention on Human Rights rulings."

Professor David Ormerod (2005)



Article 8 ECHR – privacy protection

No interference by a public authority **except** such as is:

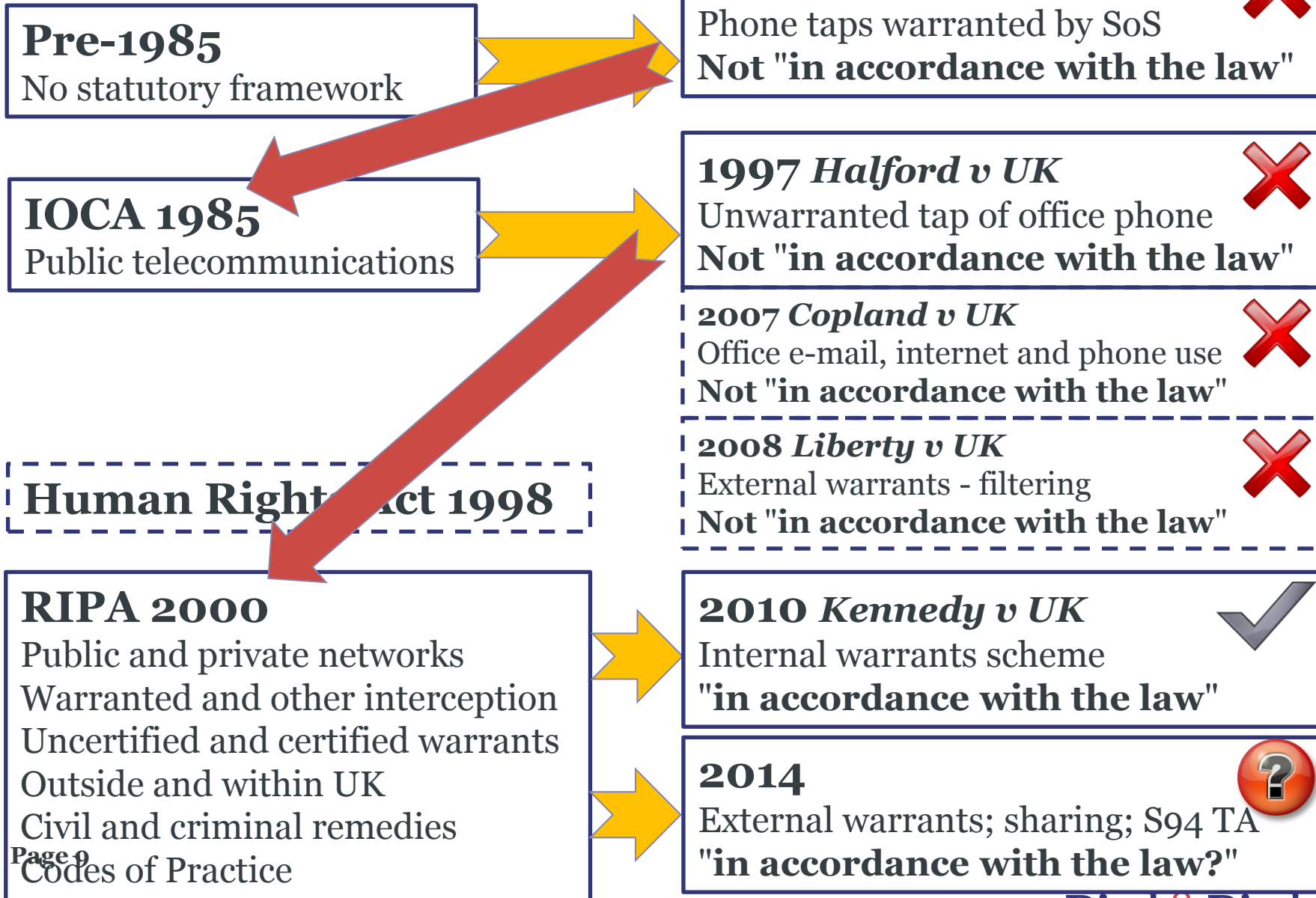
- in accordance with the law and
- is necessary in a democratic society
- in the interests of
 - national security,
 - public safety
 - or the economic well-being of the country,
 - for the prevention of disorder or crime,
 - for the protection of health or morals,
 - or for the protection of the rights and freedoms of others
- Proportionality

In accordance with the law

Existence and quality of law

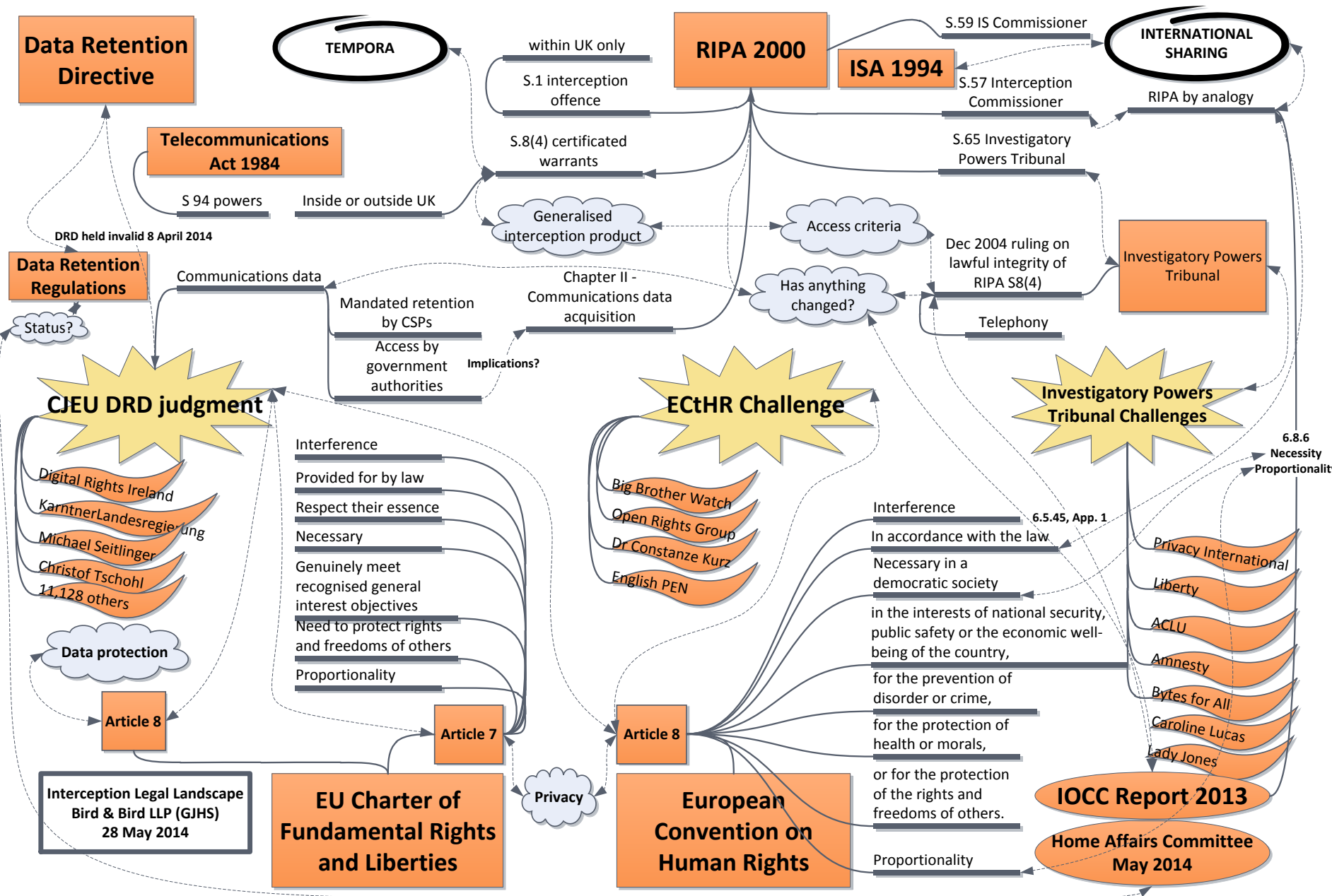
- Existence: some basis in domestic law (statute or common law)
- Quality of law – compatible with rule of law
 - Accessibility and foreseeability of consequences
 - Publication, detail and precision
 - Protection against arbitrary interference, having regard to the legitimate aim of the measure
 - For surveillance, a law which confers a discretion must indicate with sufficient clarity the scope of that discretion and the manner of its exercise
 - Contrary to rule of law for executive discretion to be expressed in terms of an unfettered power
 - Regulations, manuals and instructions (if sufficiently publicised) *Liberty v UK*

A recurrent theme



Issues?

- Has anything changed?
 - Richer metadata? Is a balance that was good enough for phones good enough for the internet and social media?
 - Blurring of domestic and external communications?
- Capture versus examination; automated versus human/sentient
 - *Liberty* (IOCA); 2004 IPT decision (RIPA); *Kennedy* (RIPA)
 - More clarity and visibility of rules required if more data captured and greater inherent discretion?
- S94 Telecommunications Act 1984?
 - Broad discretion?
 - Published rules?
 - Independent supervision?
- Sharing?
 - RIPA by analogy? Quality of law?



Thank you **& Bird & Bird**

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