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INSTITUT TADBIRAN AWAM NEGARA

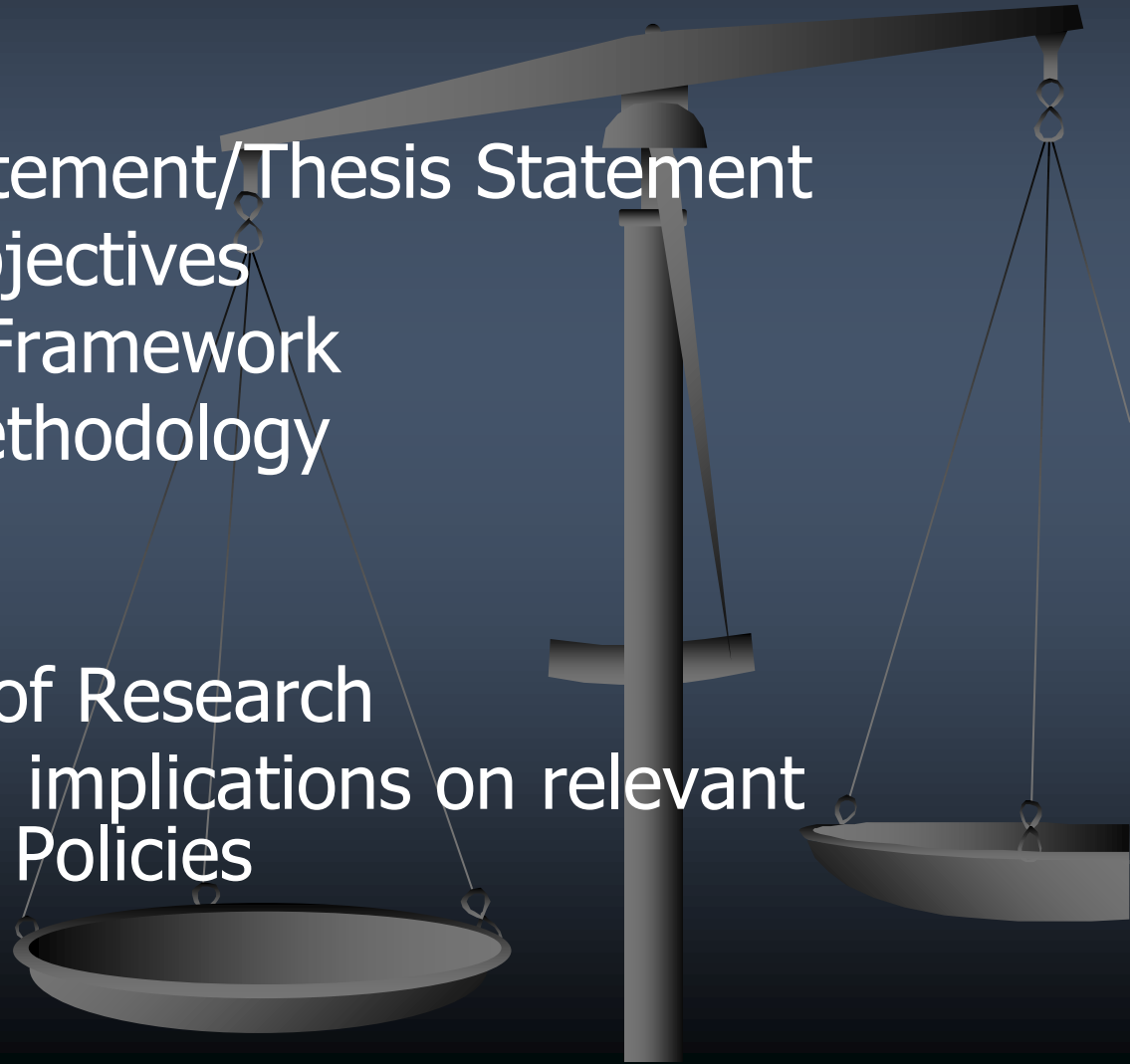
# The Best Interests of the Child Principle



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KEMENTERIAN PEMBANGUNAN USAHAWAN DAN KOPERASI

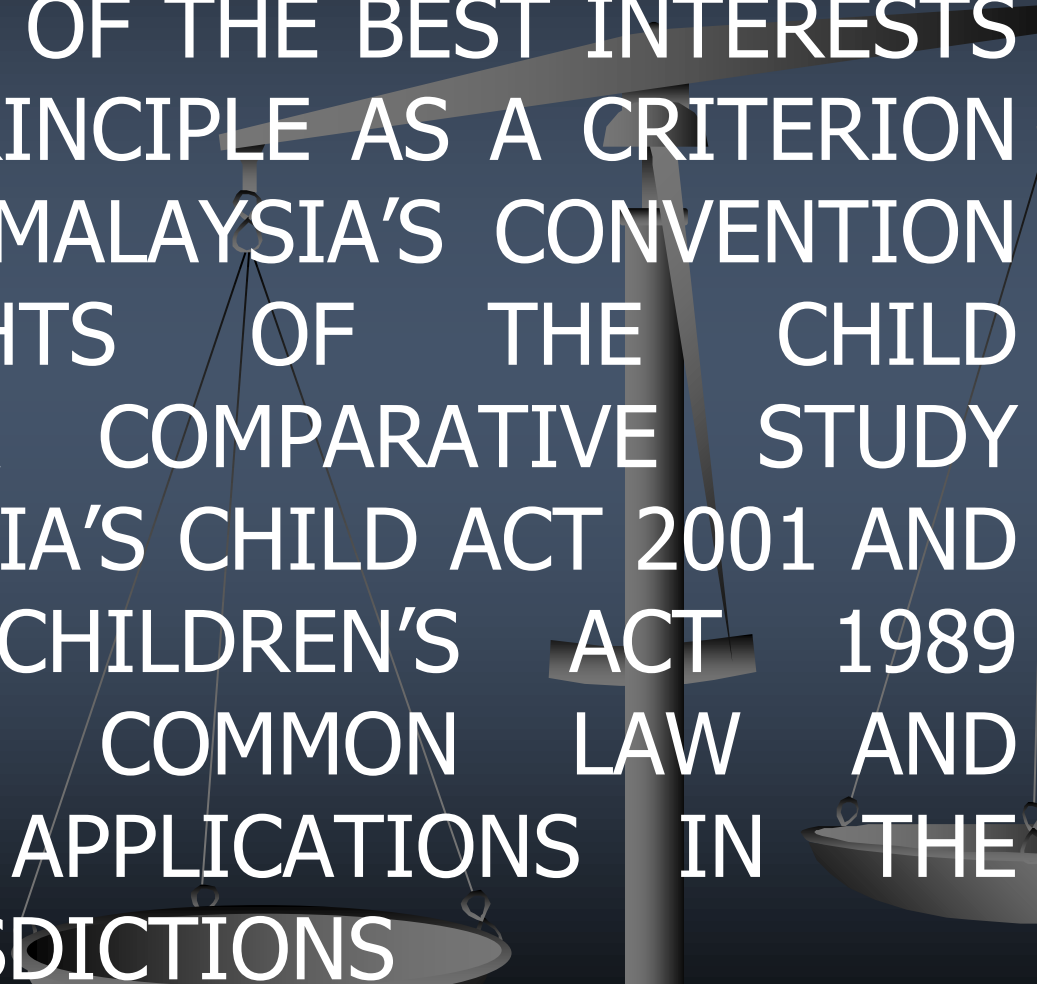
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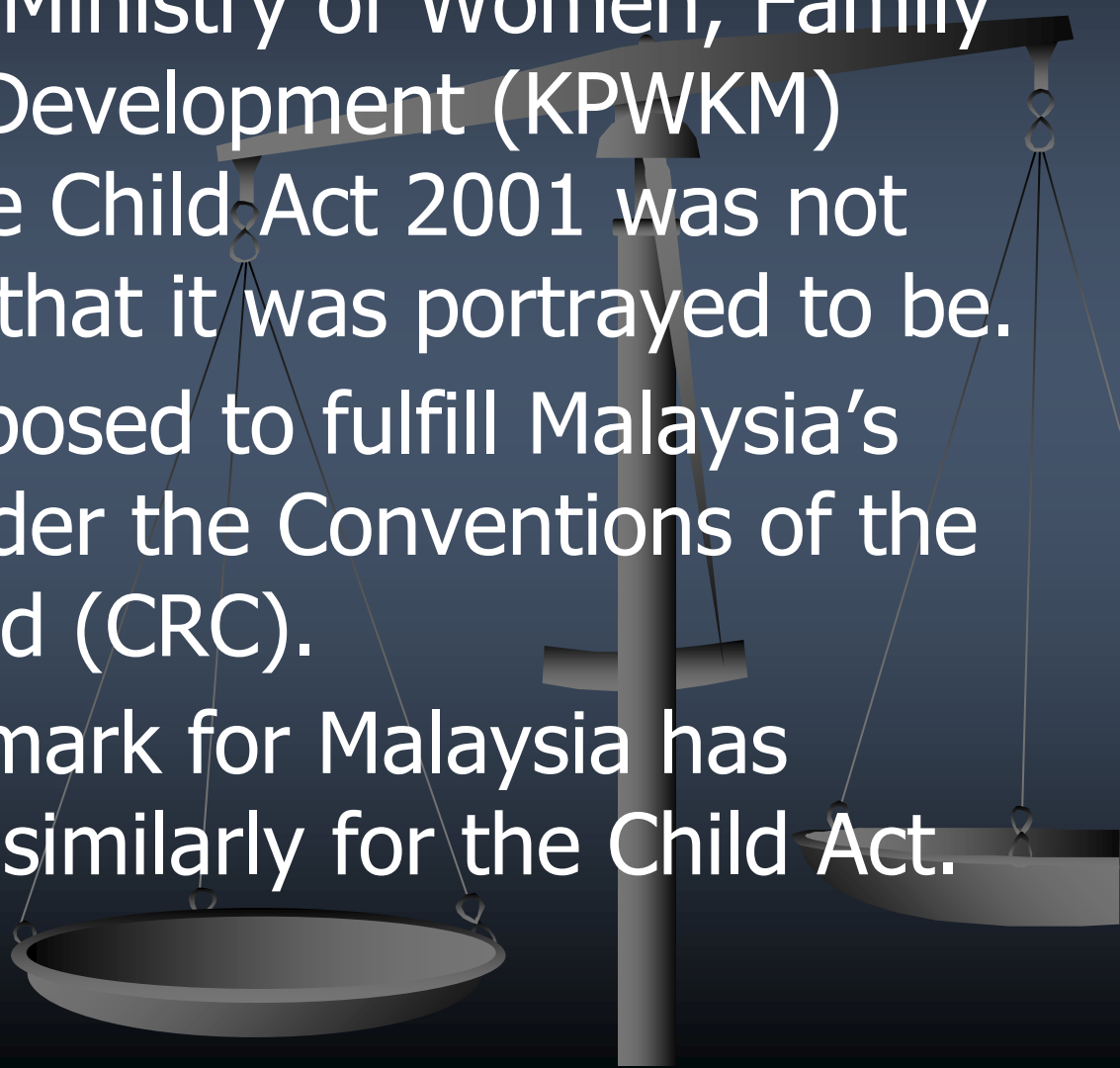
# The Thesis

THE APPLICATION OF THE BEST INTERESTS OF THE CHILD PRINCIPLE AS A CRITERION FOR FULFILLING MALAYSIA'S CONVENTION ON THE RIGHTS OF THE CHILD OBLIGATIONS: A COMPARATIVE STUDY BETWEEN MALAYSIA'S CHILD ACT 2001 AND THE ENGLISH CHILDREN'S ACT 1989 INCLUDING THE COMMON LAW AND *SHARI'AH* LAW APPLICATIONS IN THE RESPECTIVE JURISDICTIONS



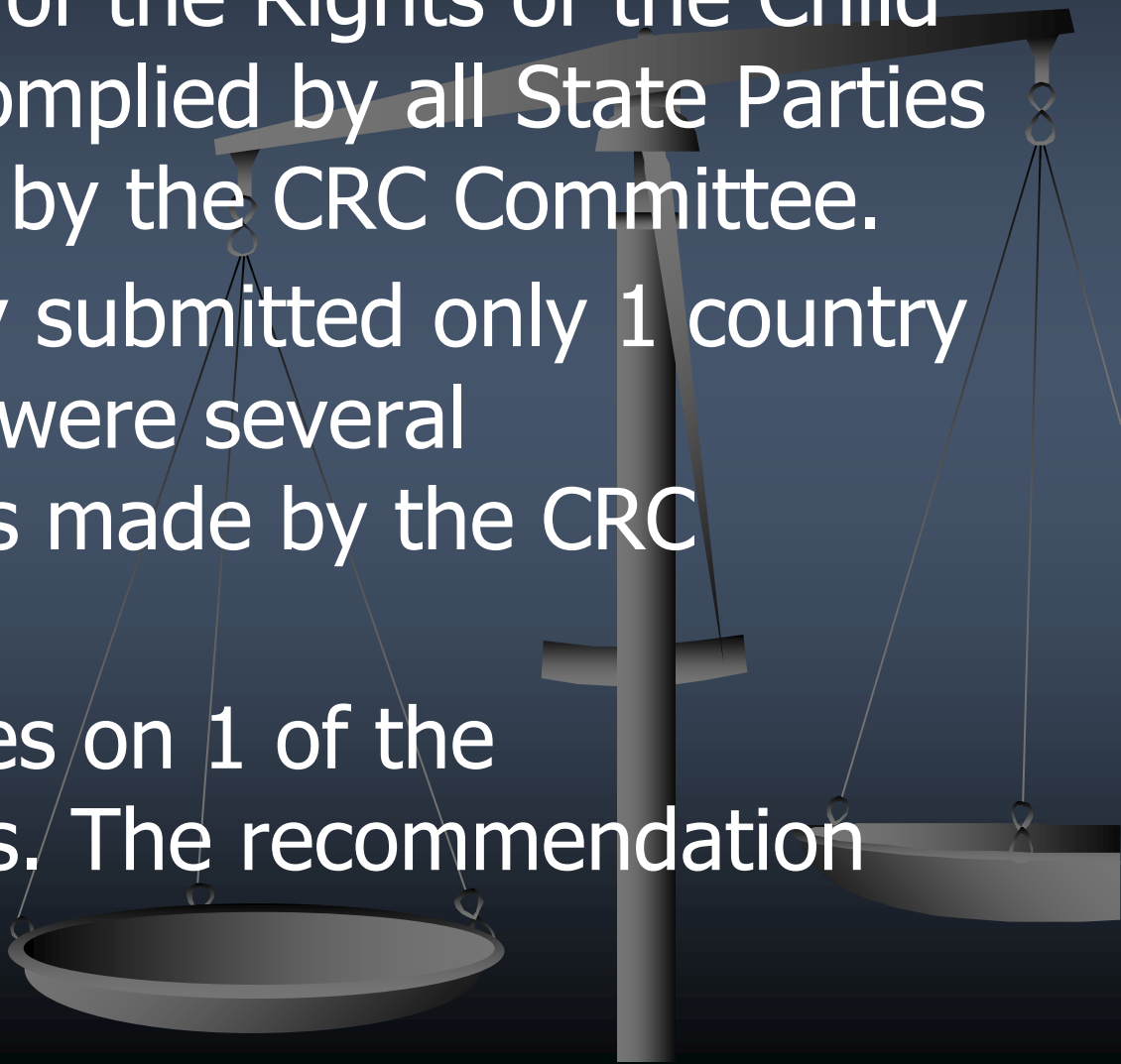
# Problem Statement

- During tenure at Ministry of Women, Family and Community Development (KPWKM) identified that the Child Act 2001 was not the idealistic Act that it was portrayed to be.
- The Act was supposed to fulfill Malaysia's commitments under the Conventions of the Rights of the Child (CRC).
- The usual benchmark for Malaysia has always been UK, similarly for the Child Act.



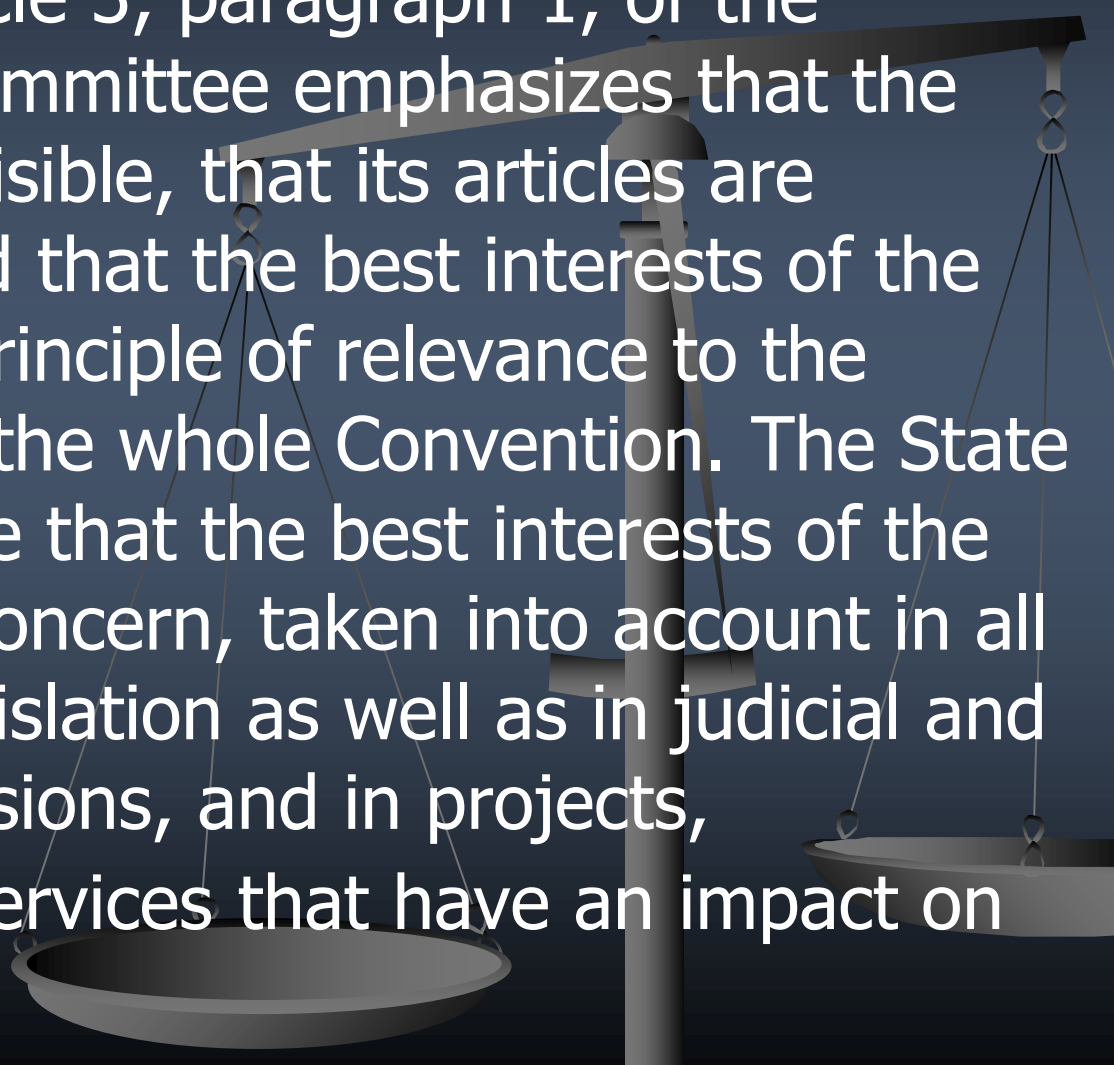
# Problem Statement

- The Conventions of the Rights of the Child (CRC) must be complied by all State Parties and is monitored by the CRC Committee.
- Malaysia has only submitted only 1 country report and there were several recommendations made by the CRC Committee.
- This thesis focuses on 1 of the recommendations. The recommendation states as follow:



# Problem Statement

- 37. As regards article 3, paragraph 1, of the Convention, the Committee emphasizes that the Convention is indivisible, that its articles are interdependent and that the best interests of the child is a general principle of relevance to the implementation of the whole Convention. The State party should ensure that the best interests of the child is a primary concern, taken into account in all revisions of the legislation as well as in judicial and administrative decisions, and in projects, programmes and services that have an impact on children.



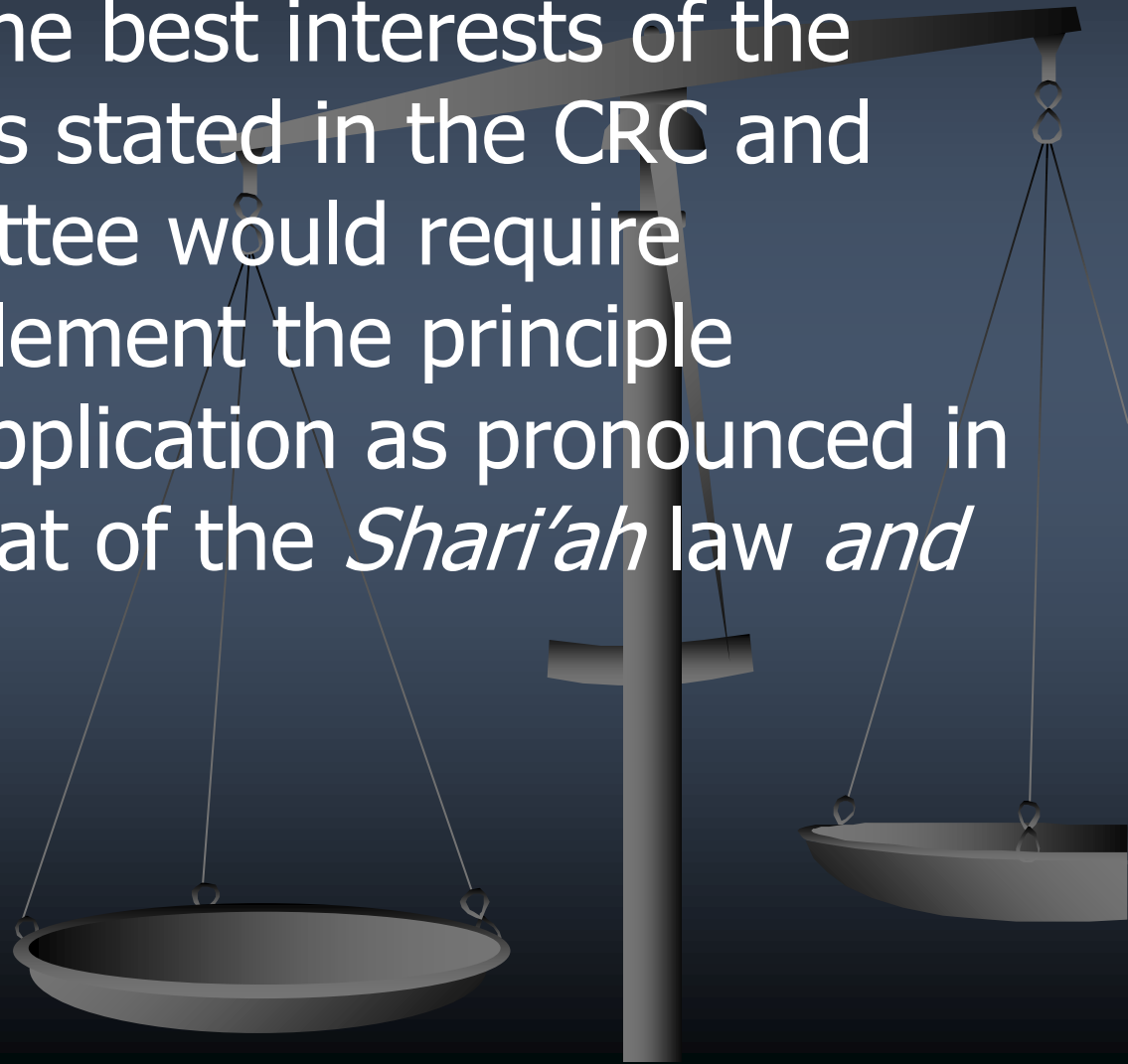
# Problem Statement

- The CRC Committee recommendation above is the essence of this research.
- The question is whether Malaysia has fulfilled her obligations under the CRC using the best interests of the child principle as a yardstick being one of the core principles?



# Thesis Statement

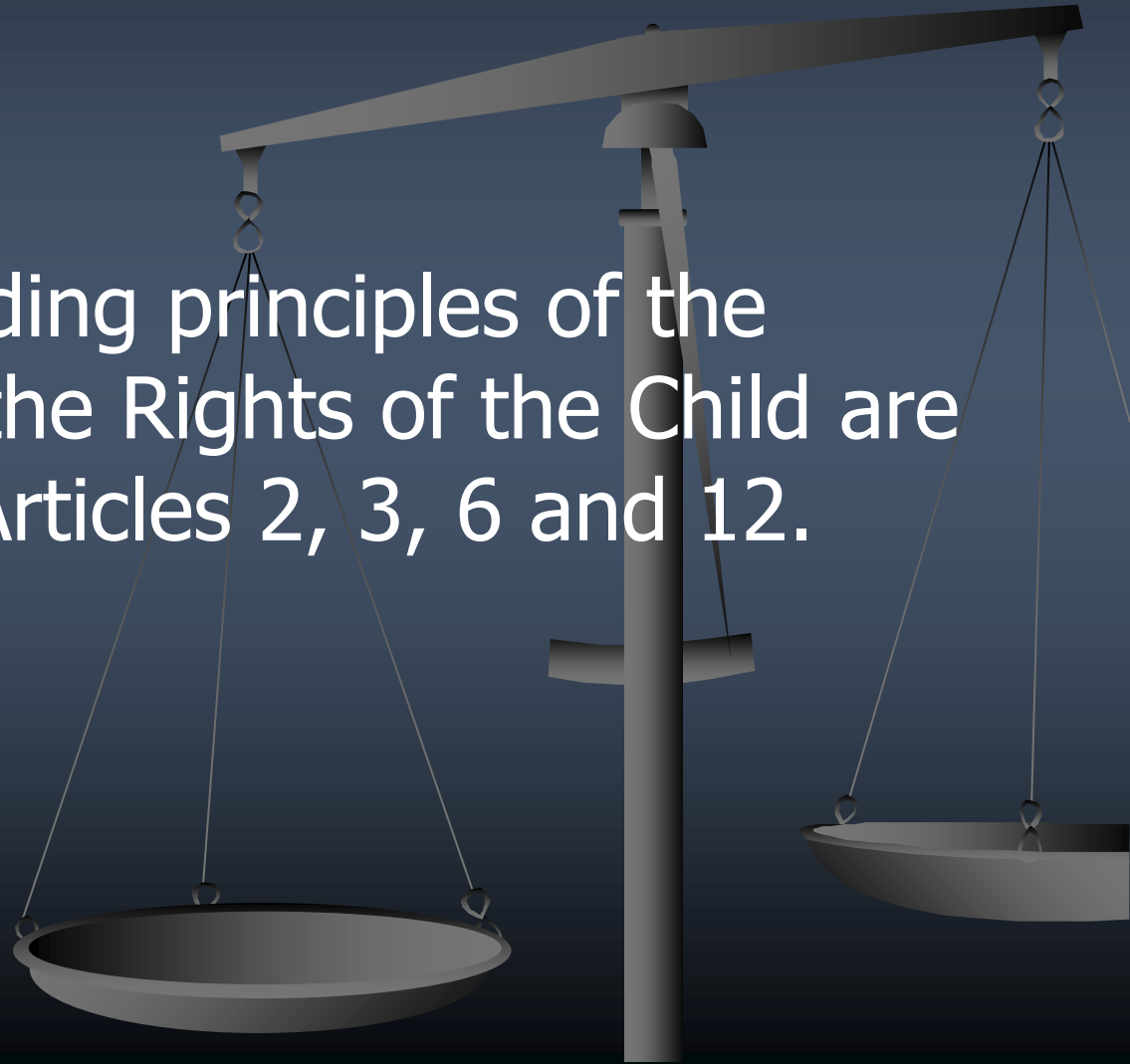
- Implementing the best interests of the child principle as stated in the CRC and the CRC Committee would require Malaysia to implement the principle balancing the application as pronounced in the CRC with that of the *Shari'ah* law and the civil law.



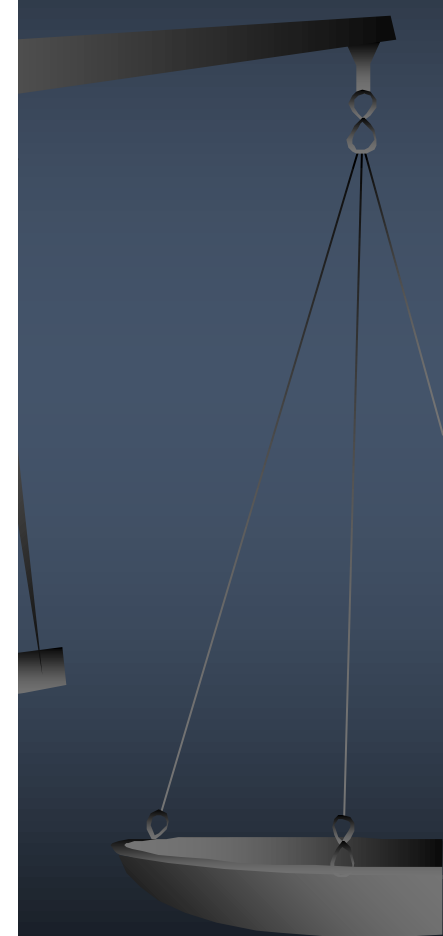
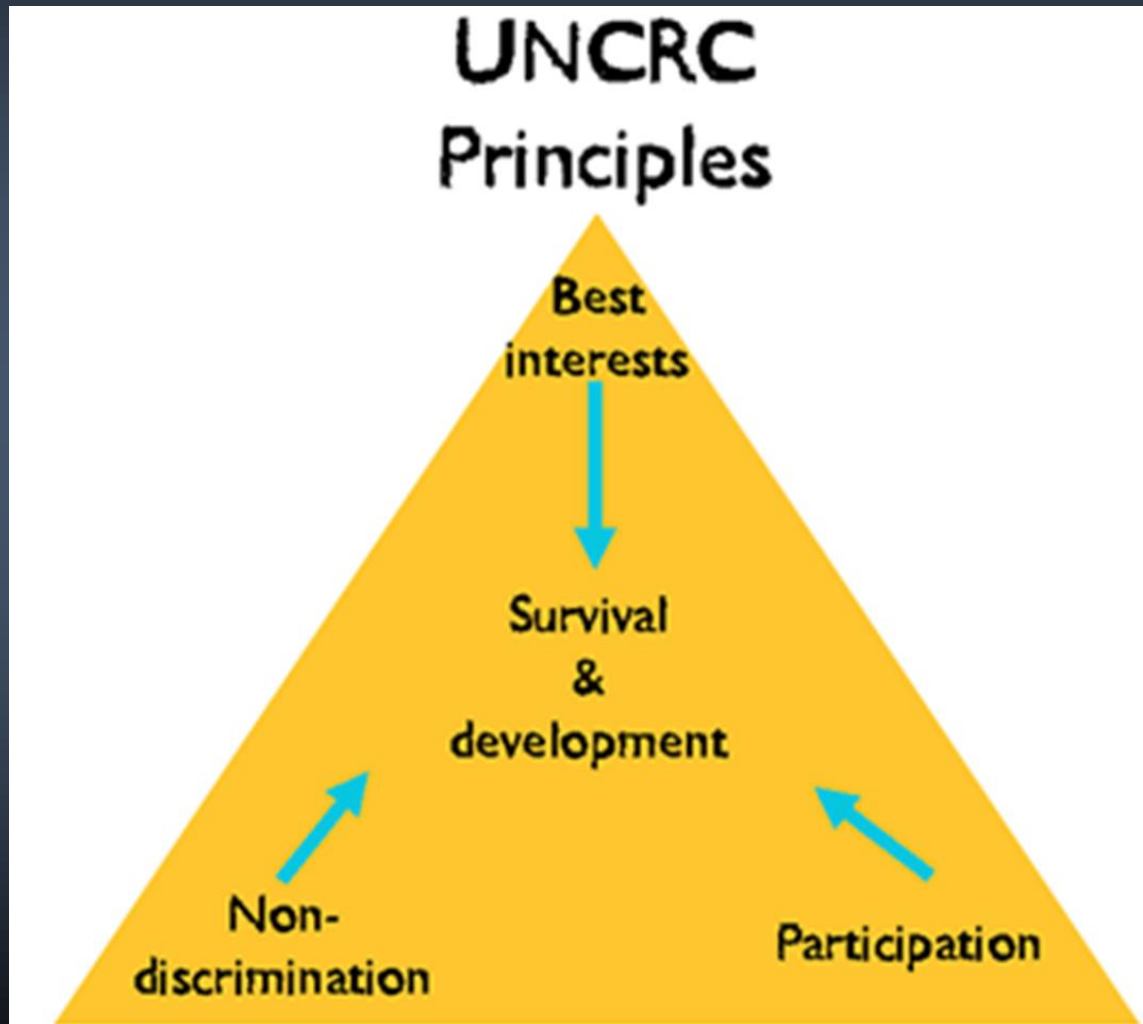


# Principles

- The core or guiding principles of the Convention on the Rights of the Child are to be found in Articles 2, 3, 6 and 12.



# Principles



# Article 3 – Best Interests of the Child

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child **shall be a primary consideration.**



# Best Interests of the Child



1. Welfare of the child.

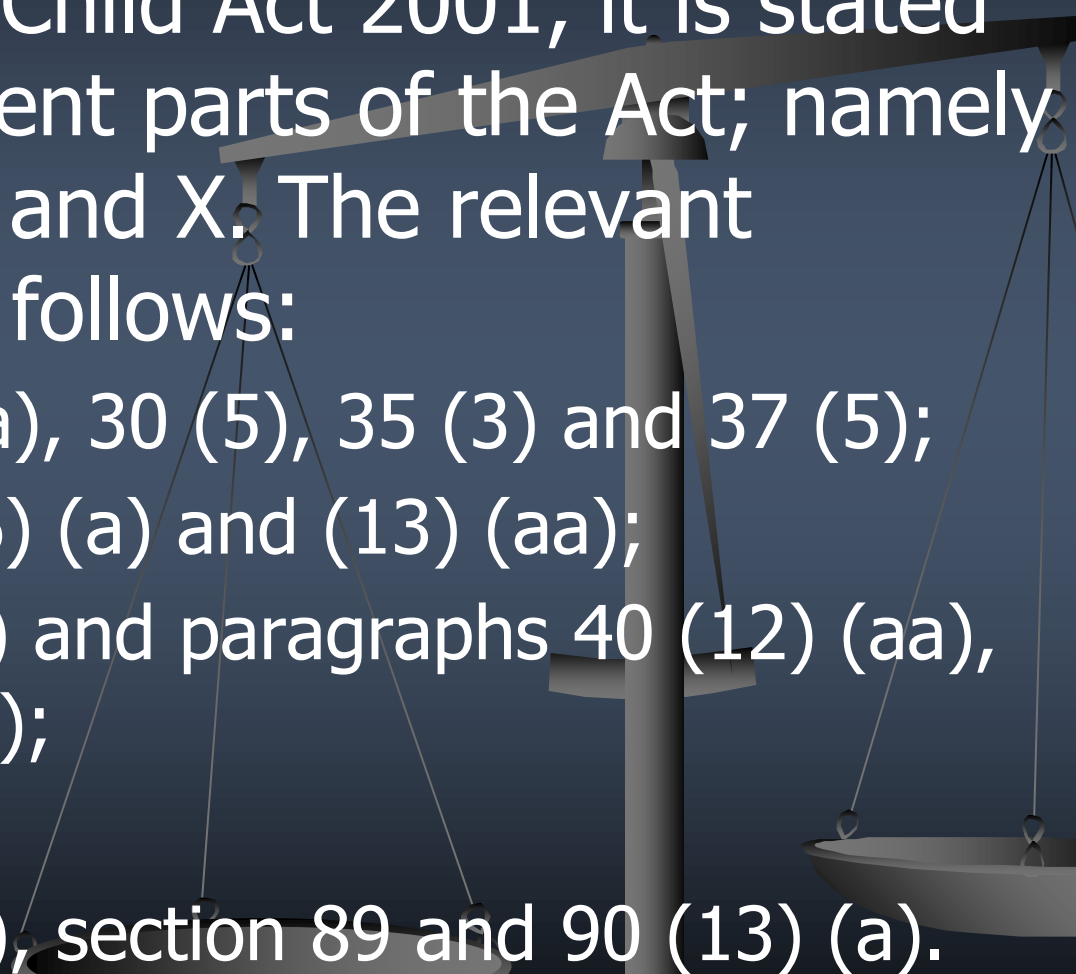
(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

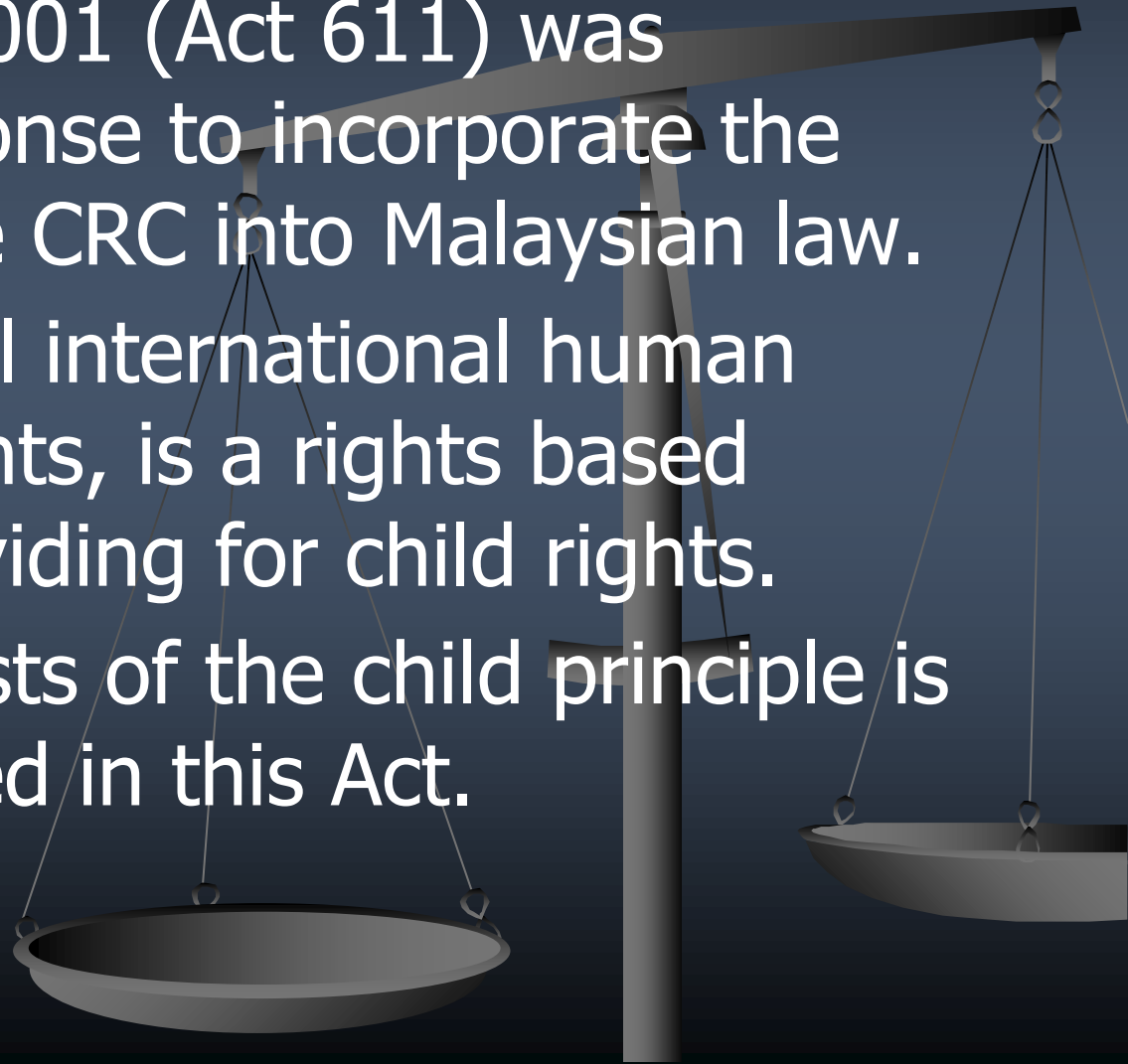
the child's welfare shall be the court's **paramount consideration.**

# Best Interests of the Child

- In the Malaysian Child Act 2001, it is stated 13 times in different parts of the Act; namely in Parts V, VI, IX and X. The relevant provisions are as follows:
    - subsections 18 (a), 30 (5), 35 (3) and 37 (5);
    - paragraphs 30 (6) (a) and (13) (aa);
    - subsection 40 (5) and paragraphs 40 (12) (aa), 42 (7) (a) and (b);
    - section 80; and
    - subsection 84 (3), section 89 and 90 (13) (a).
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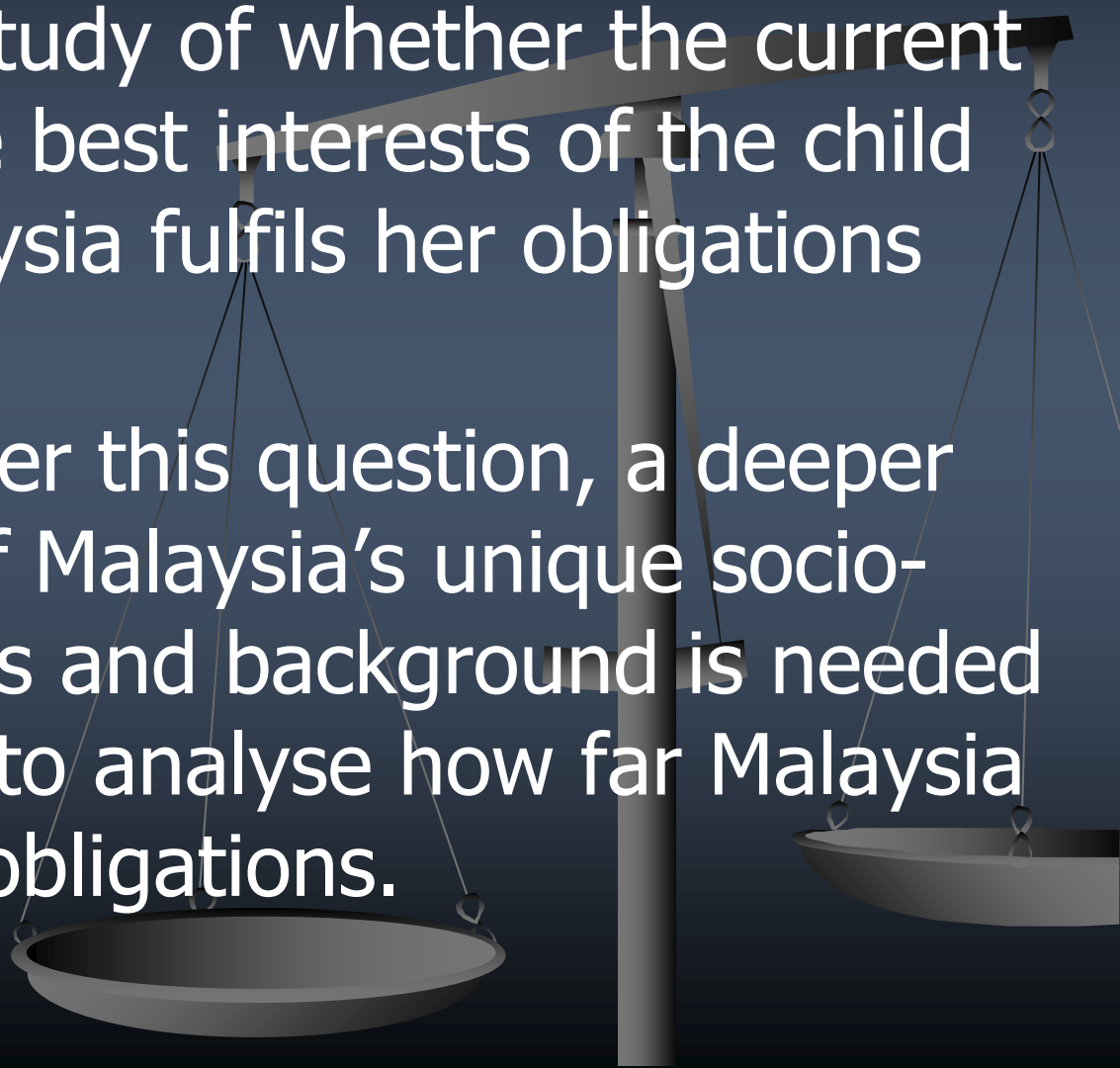
# Conceptual Framework

- The Child Act 2001 (Act 611) was Malaysia's response to incorporate the principles of the CRC into Malaysian law.
- The CRC, like all international human rights instruments, is a rights based convention providing for child rights.
- The best interests of the child principle is also incorporated in this Act.



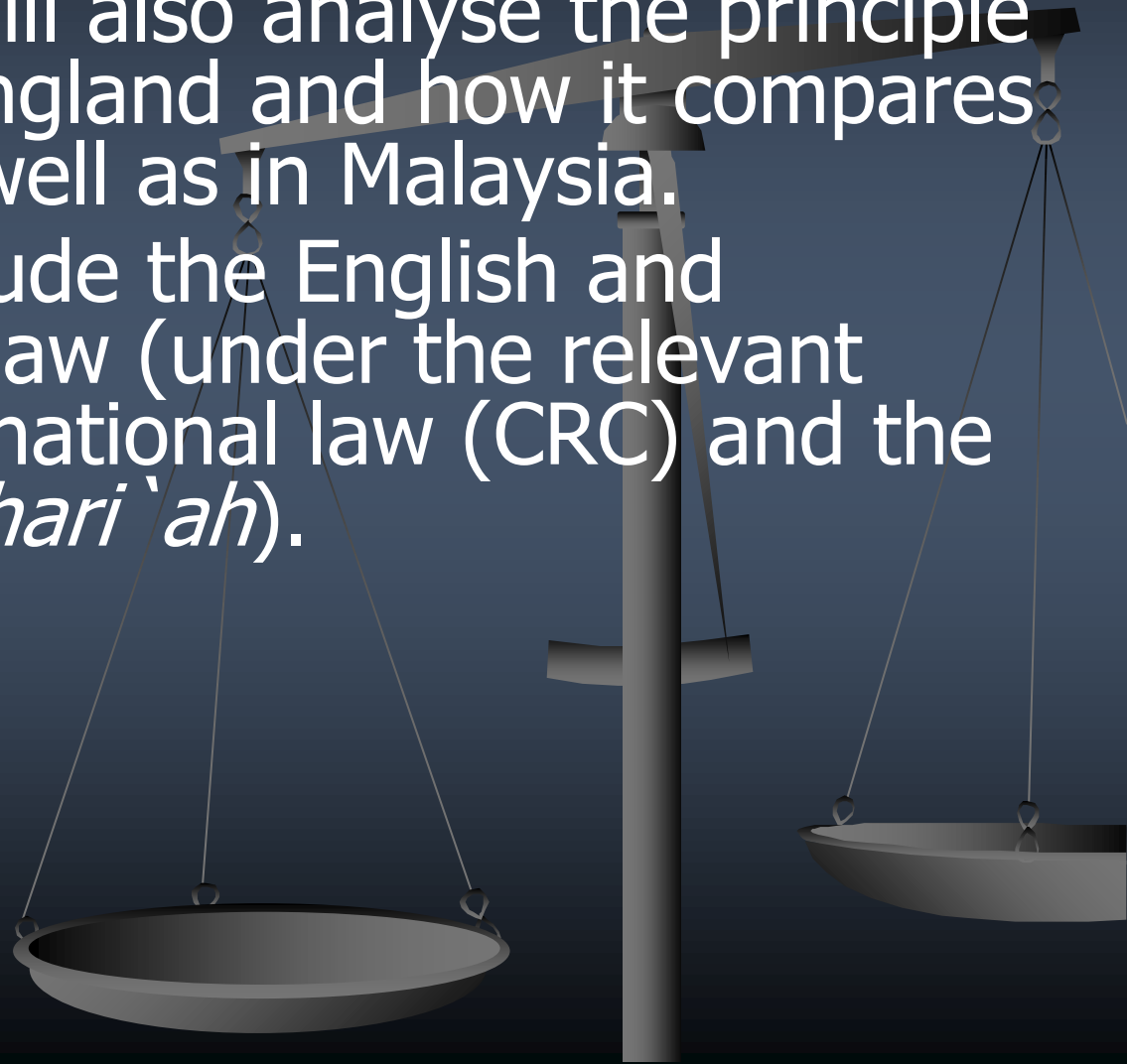
# Conceptual Framework

- This thesis is a study of whether the current standards on the best interests of the child principle in Malaysia fulfils her obligations under the CRC.
- In order to answer this question, a deeper understanding of Malaysia's unique socio-legal complexities and background is needed so as to be able to analyse how far Malaysia has fulfilled her obligations.



# Conceptual Framework

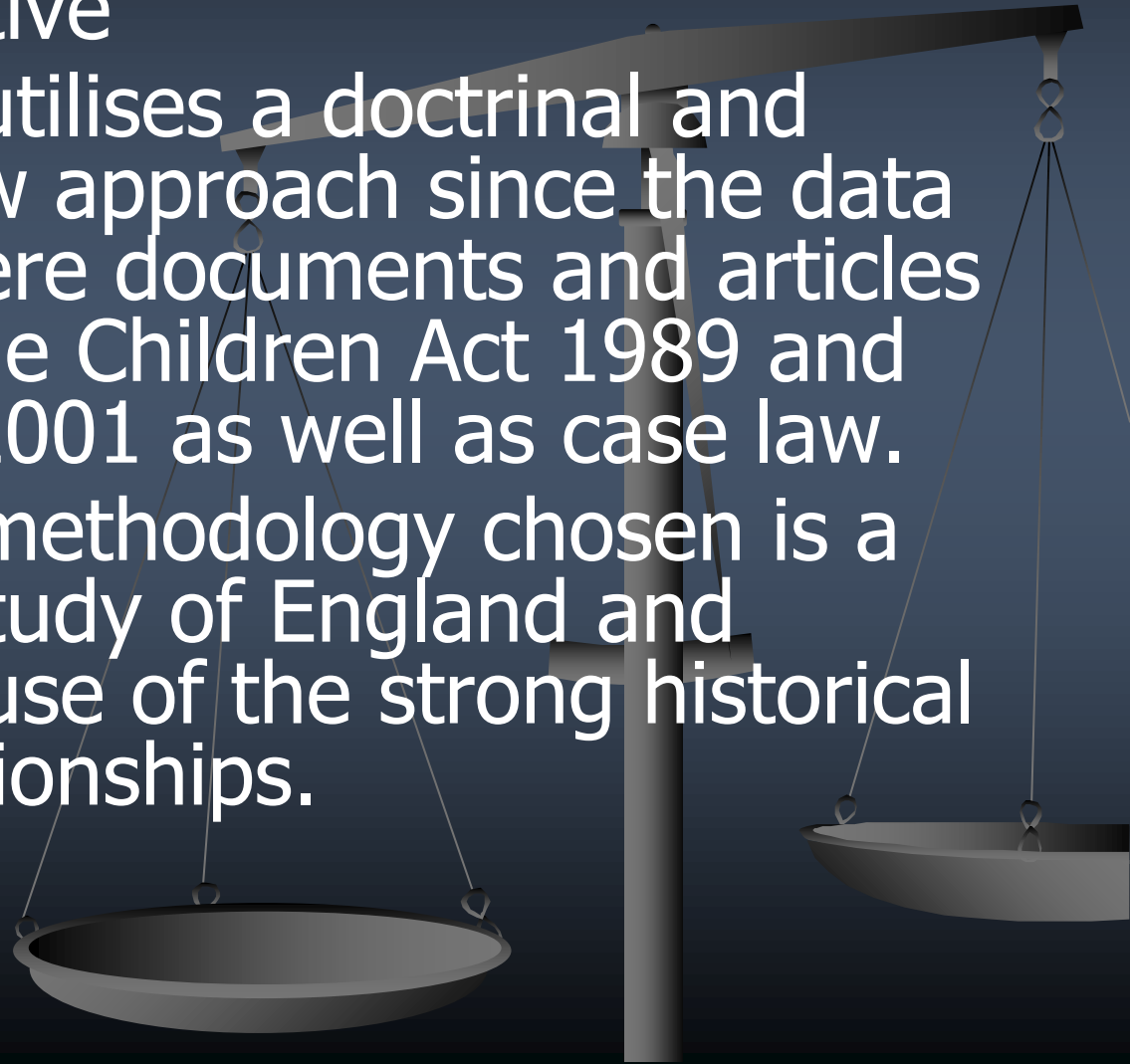
- The research will also analyse the principle as applied in England and how it compares to the CRC as well as in Malaysia.
- This would include the English and Malaysian civil law (under the relevant Acts), the international law (CRC) and the Islamic Law (*Shari`ah*).





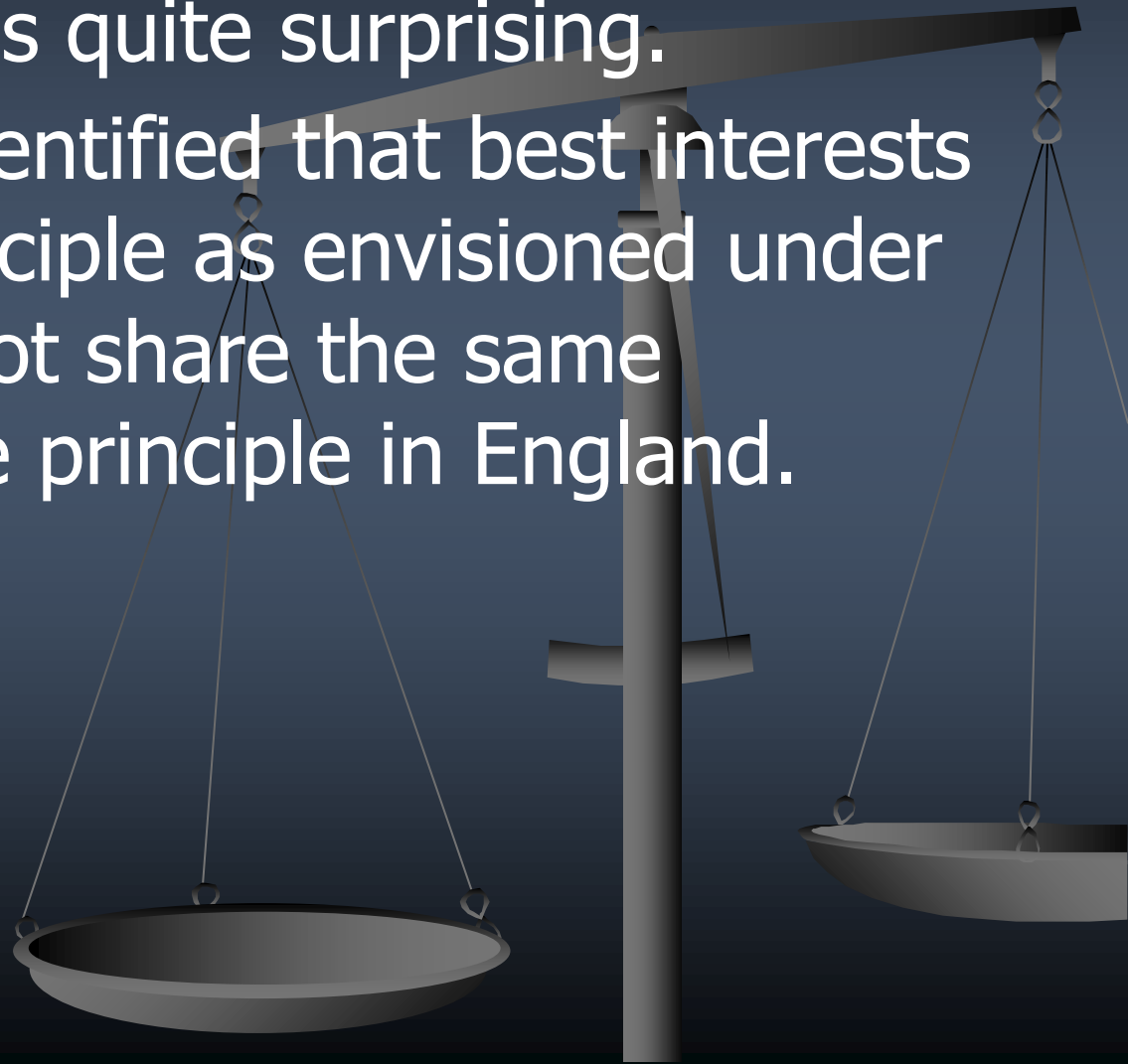
# Research Methodology

- Purely Qualitative
- The research utilises a doctrinal and black-letter law approach since the data for analysis were documents and articles on the CRC, the Children Act 1989 and the Child Act 2001 as well as case law.
- The research methodology chosen is a comparative study of England and Malaysia because of the strong historical and legal relationships.



# Findings

- The findings was quite surprising.
- The research identified that best interests of the child principle as envisioned under the CRC does not share the same threshold as the principle in England.



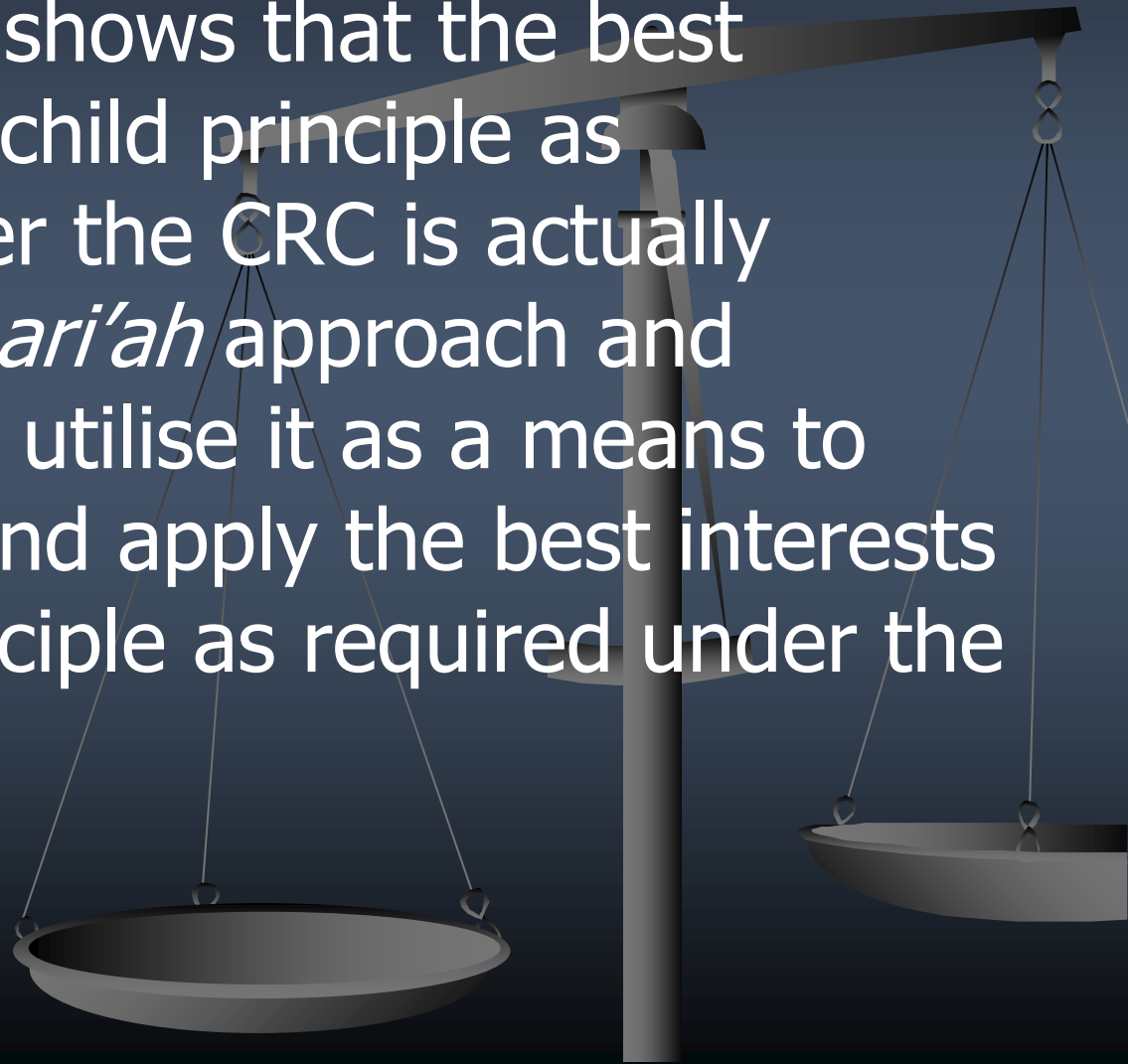
# Findings

- The threshold of the principle in England is higher than that set in the CRC.
- This proved a problem for many Muslim states and Malaysia included.



# Findings

- This thesis also shows that the best interests of the child principle as envisioned under the CRC is actually closer to the *Shari'ah* approach and Malaysia should utilise it as a means to move forward and apply the best interests of the child principle as required under the CRC.



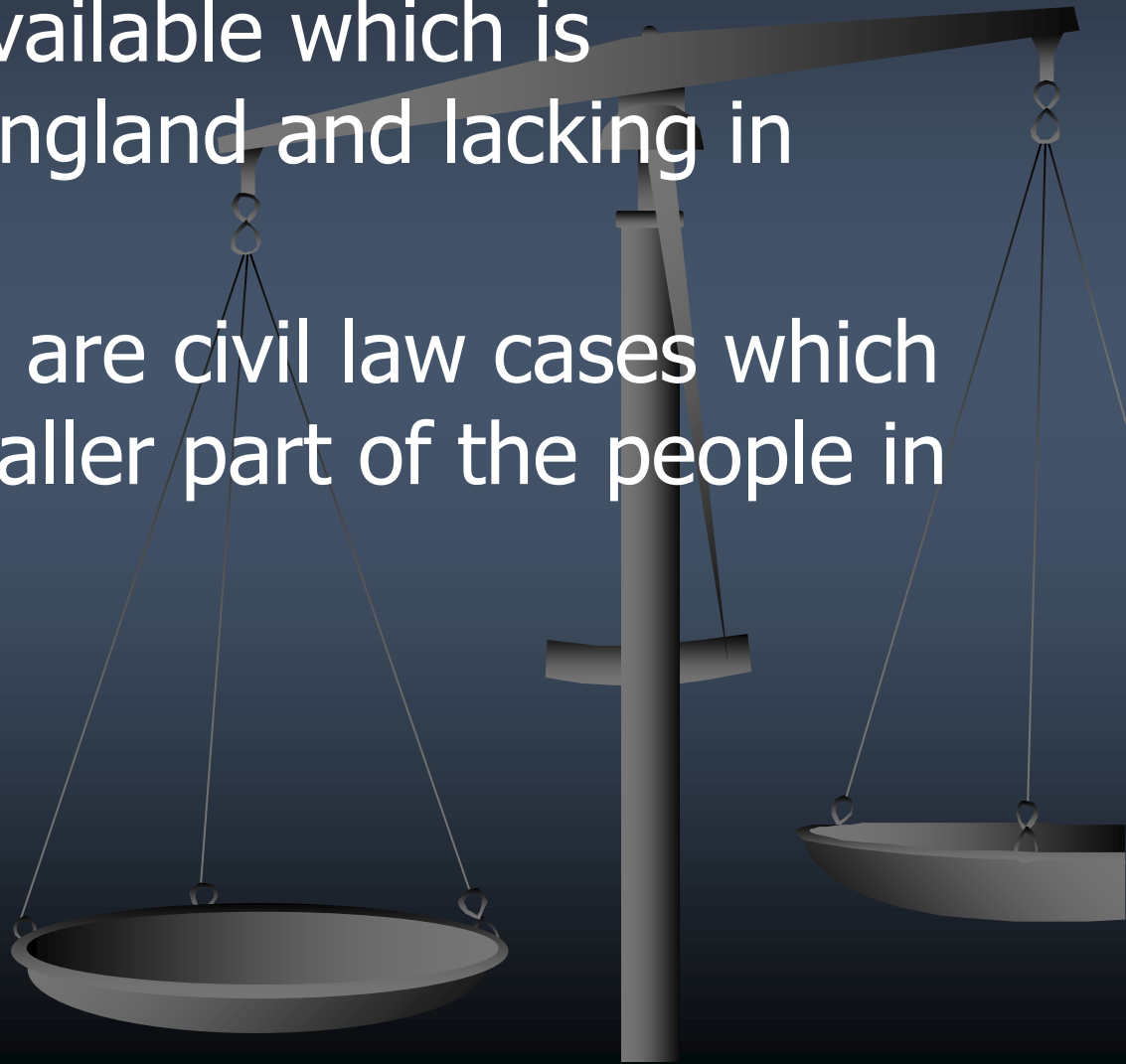
# Challenges

- Although not explicitly mentioned Malaysia practices legal pluralism.
- Generally, Malaysia applies the common law.
- In the field of personal law, the *Shari' ah* is applied.
- These 2 legal jurisprudence have almost no common ground.



# Challenges

- The literature available which is voluminous in England and lacking in Malaysia.
- The only source are civil law cases which only cover a smaller part of the people in Malaysia.



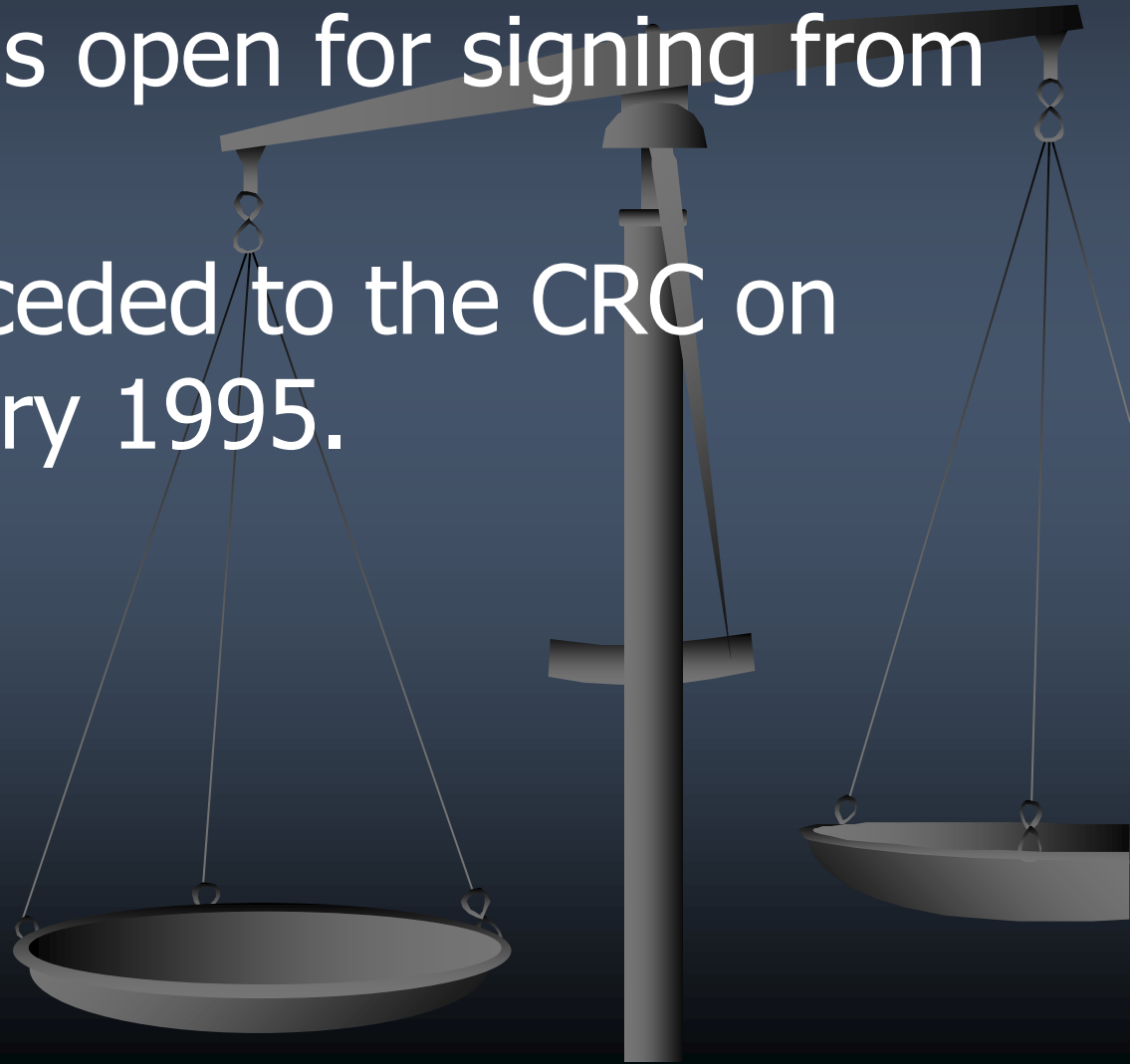
# Challenges

- The literature on the Islamic Law (*Shari`ah*) in a language other than Arabic is nominal.
- Lack of uniform *Shari`ah* laws in Malaysia (among the states) and in the world in general (different schools of thought).



# Importance of the research

- The CRC was open for signing from 1989.
- Malaysia acceded to the CRC on 17th February 1995.





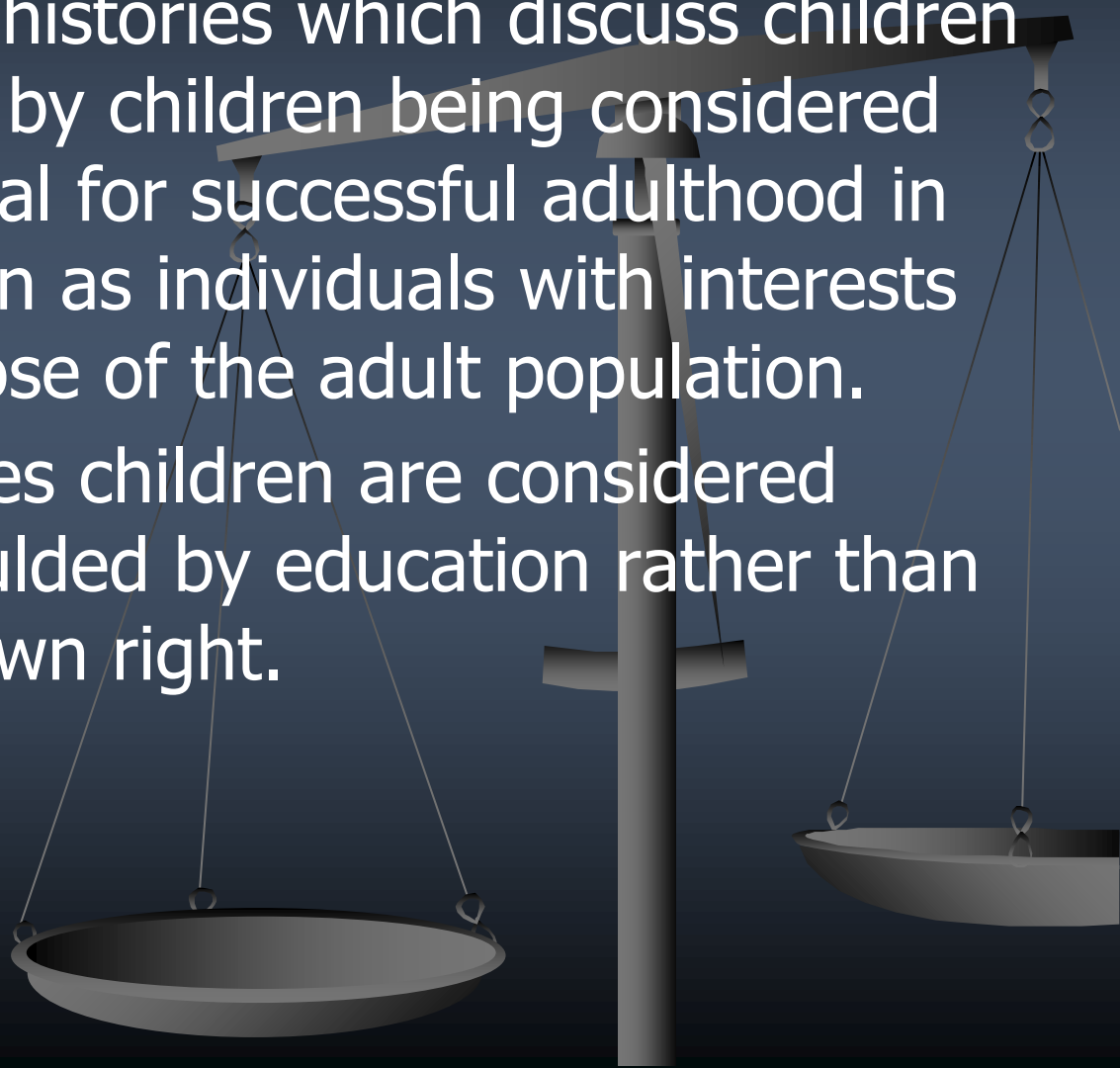
# Importance of the research

- Ratification and accessions to human rights treaties are expected in the international legal fraternity.
- Malaysia has the lowest number of ratification or accessions in South East Asia.
- 3 of 9
- Malaysia has to improve her human rights record.



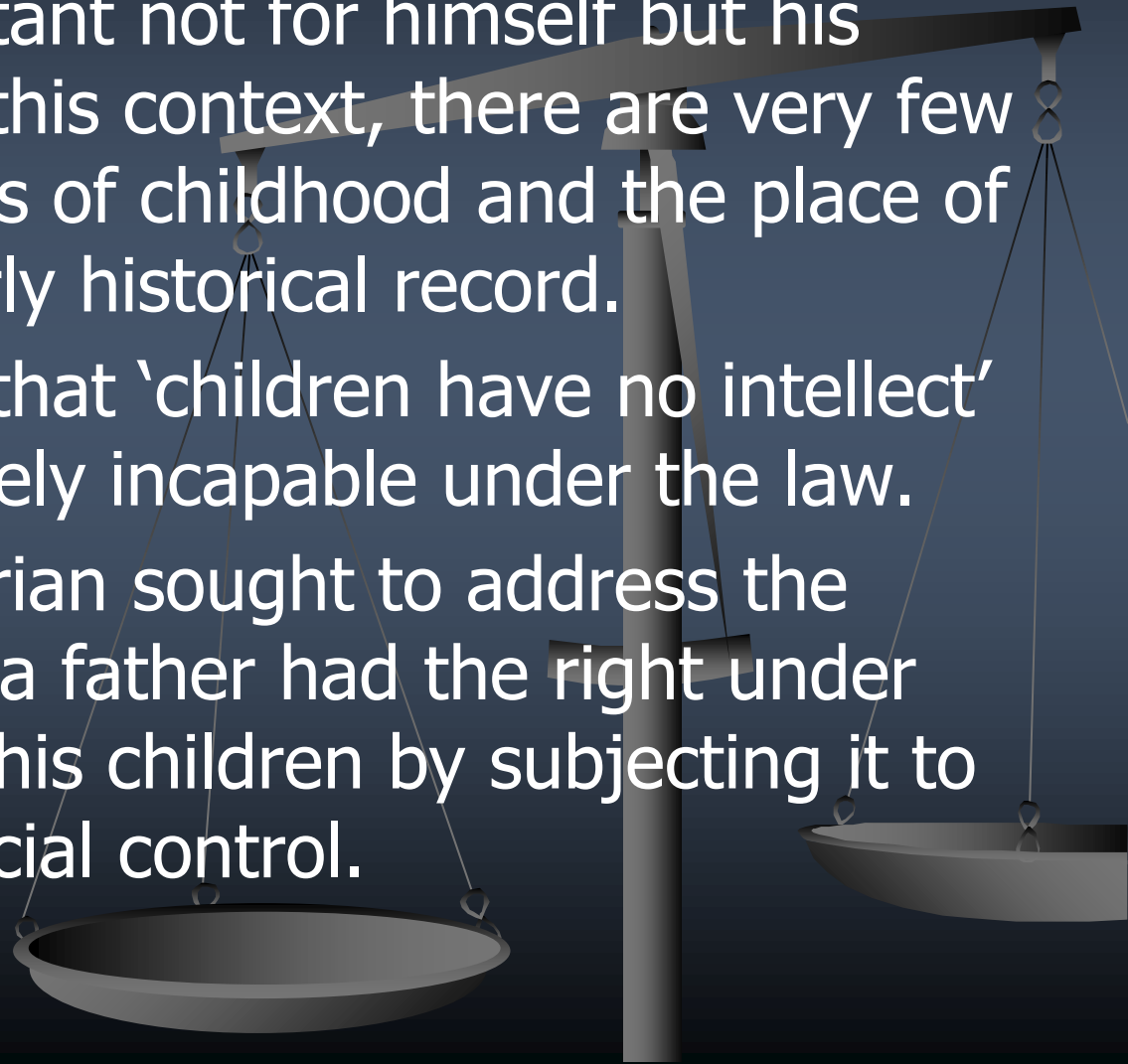
# Purpose

- The early written histories which discuss children are characterised by children being considered as the raw material for successful adulthood in society rather than as individuals with interests separate from those of the adult population.
- In Plato's dialogues children are considered objects to be moulded by education rather than persons in their own right.

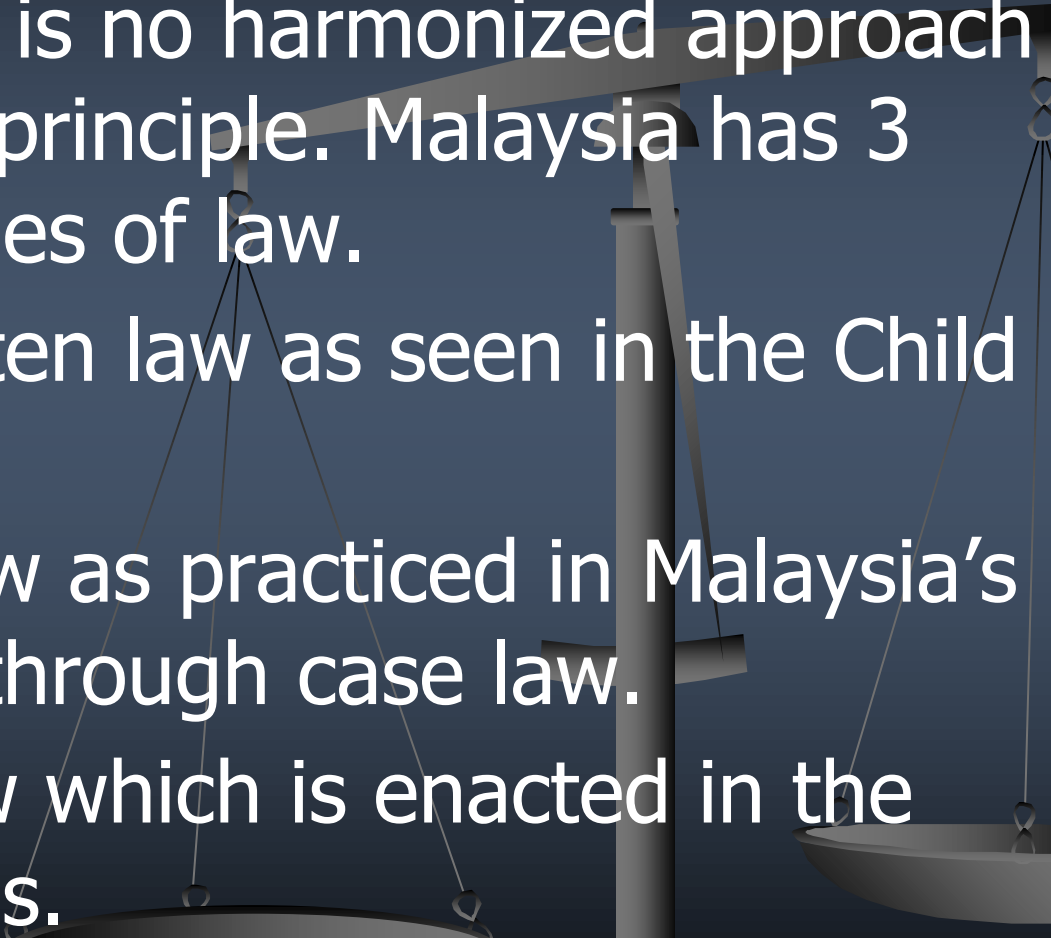


# Purpose

- The Aristotelean concept of child was likewise that the child is 'important not for himself but his potential.' Within this context, there are very few first hand accounts of childhood and the place of children in the early historical record.
- Gaius considered that 'children have no intellect' and were completely incapable under the law.
- The Emperor Hadrian sought to address the practice by which a father had the right under Roman law to kill his children by subjecting it to some form of judicial control.

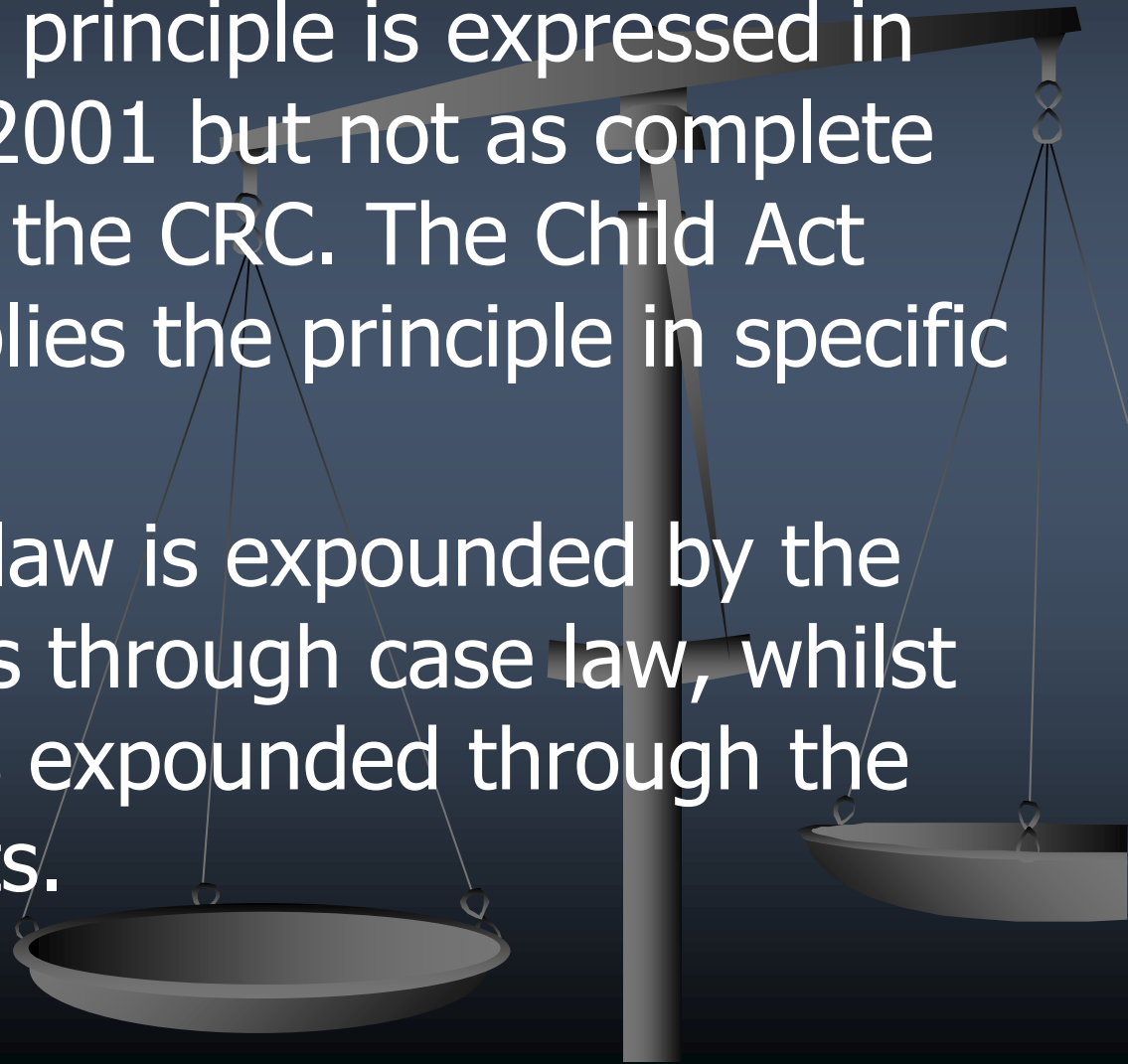


# Findings and implications on relevant Government Policies

- Currently, there is no harmonized approach in applying this principle. Malaysia has 3 separate branches of law.
  - Statutes or written law as seen in the Child Act.
  - The common law as practiced in Malaysia's civil law courts through case law.
  - The *Shari'ah* law which is enacted in the State legislatures.
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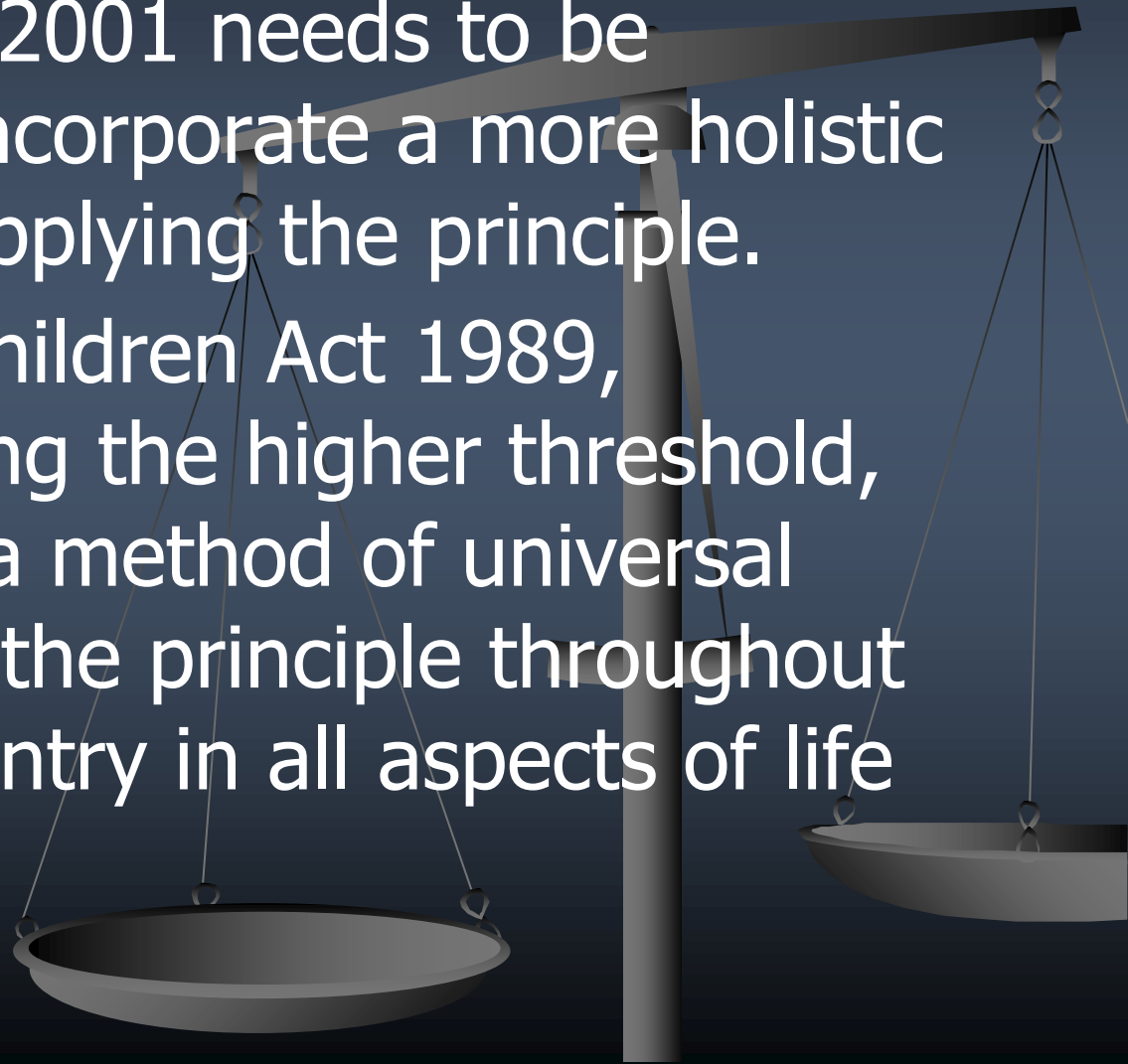
# Findings and implications on relevant Government Policies

- Generally, the principle is expressed in the Child Act 2001 but not as complete as required in the CRC. The Child Act 2001 only applies the principle in specific instances.
- The common law is expounded by the civil law courts through case law, whilst the *Shari'ah* is expounded through the *Shari'ah* Courts.



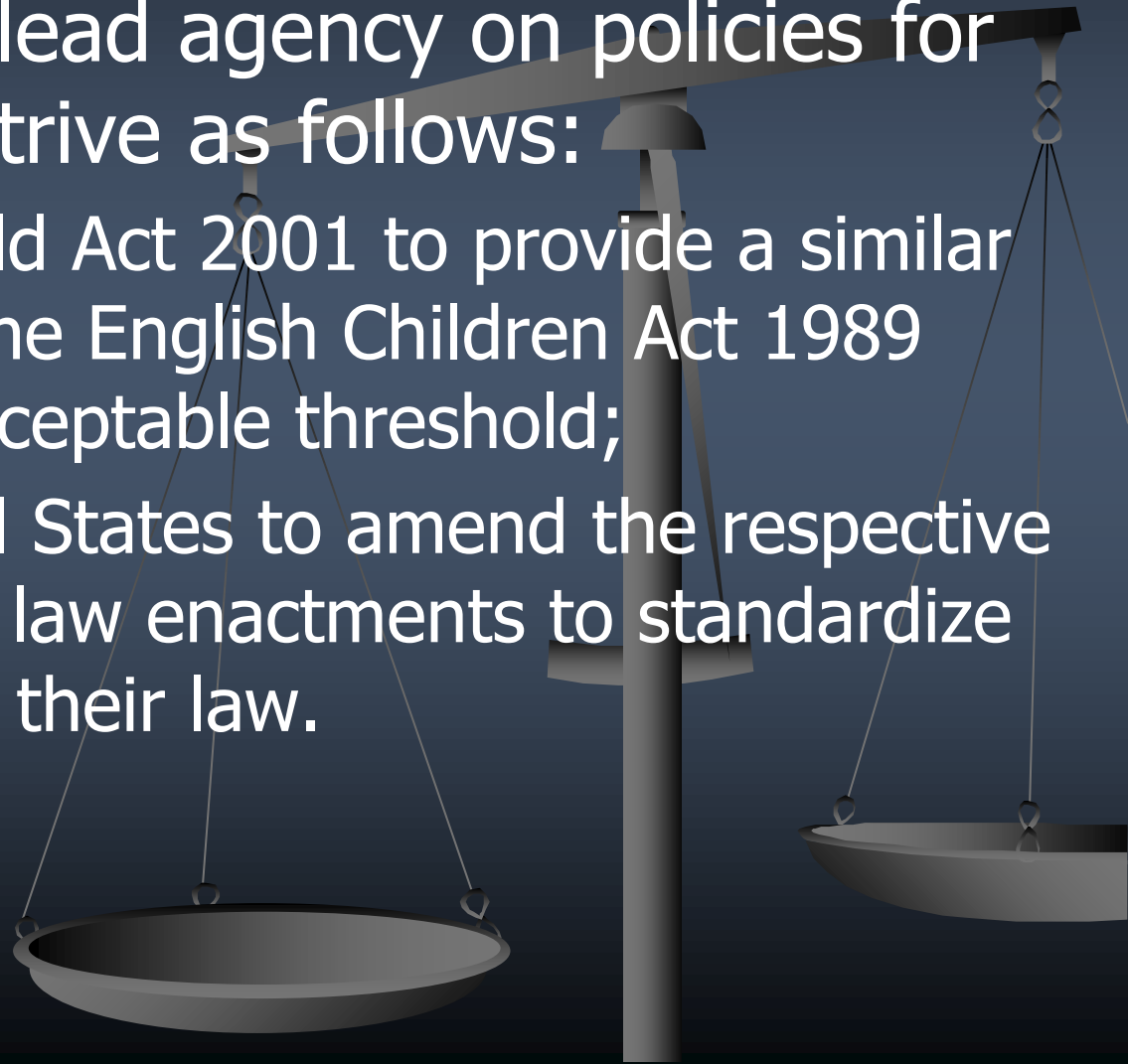
# Findings and implications on relevant Government Policies

- The Child Act 2001 needs to be amended to incorporate a more holistic approach in applying the principle.
- The English Children Act 1989, notwithstanding the higher threshold, has provided a method of universal application of the principle throughout the whole country in all aspects of life for the child.



# Findings and implications on relevant Government Policies

- KPWKM as the lead agency on policies for children must strive as follows:
  - Amend the Child Act 2001 to provide a similar provision like the English Children Act 1989 with a more acceptable threshold;
  - Engage with all States to amend the respective *Shari'ah* family law enactments to standardize and harmonize their law.



# Findings and implications on relevant Government Policies

- There must be strong policy direction by the Government towards this objective.
- Once the laws have been amended and harmonized the principle will be applied uniformly.
- Until that happens, Malaysia will not be able to fulfil the CRC obligations.





**Sekian,  
Terima Kasih**

