

# Delegated Power and Regulatory Failure: A Governance-Based Analysis of LPQB's Ultra Vires Abolition of Articled Clerkship

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## ABSTRACT

This article examines the Legal Profession Qualifying Board's ("LPQB") 1985 administrative decision to abolish articled clerkship, a statutory pathway to admission expressly preserved under the Legal Profession Act 1976 ("LPA"). Although no legislative amendment or gazetted rule ever eliminated this route, the legal profession operated for nearly four decades as if articled clerkship had been lawfully discontinued. Drawing upon the theoretical frameworks of Ogus (delegation and accountability), Baldwin (regulatory standards and legitimacy), and Black (interpretive drift in decentred regulatory environments), this article argues that the LPQB's action constitutes a multi-layered regulatory failure. The Court of Appeal's decision in *Fahri, Azzat & Co (sebuah firma) & Anor v Lembaga Kelayakan Profesion Undang-Undang* (2024), later left undisturbed by the Federal Court, confirms that the LPQB acted ultra vires and exceeded the limits of delegated authority conferred by Parliament. Through doctrinal and theoretical analysis, this article demonstrates how institutional drift, opacity in regulatory practices, weak oversight mechanisms, and the absence of procedural safeguards contributed to decades of systemic misunderstanding. It concludes by proposing governance reforms to strengthen accountability, transparency, and statutory fidelity in Malaysia's professional regulatory landscape.

## INTRODUCTION

The governance of professional entry is a critical component of any legal system. In Malaysia, this responsibility lies predominantly with the Legal Profession Qualifying Board ("LPQB"), a statutory regulator established under the Legal Profession Act 1976 ("LPA"). The LPQB is entrusted with ensuring that pathways into the legal profession reflect competence and integrity, and that its regulatory decisions remain faithful to statutory limits and procedurally legitimate.

This article makes three contributions. First, it reframes the LPQB's 1985 decision to discontinue the registration of articled clerks as a problem of regulatory governance failure, not merely an administrative law misstep. Second, it integrates institutional and governance theory to explain how an ultra vires practice can persist through organisational inertia and weak accountability. Third, it develops LPQB-specific reform proposals aimed at strengthening statutory fidelity, transparency, and oversight in professional regulation.

The controversy arises from the LPQB's 1985 administrative decision to abolish articled clerkship—an apprenticeship-based qualification route that remains provided for in ss. 20–25 and s. 10(b) of LPA. Although Parliament has amended the LPA several times, it has never repealed these provisions. Yet, for nearly four decades, articled clerkship was treated in practice as obsolete, despite the absence of any formal rule made under s. 6 of LPA and the absence of a legislative amendment to remove the scheme.

In *Fahri, Azzat & Co (sebuah firma) & Anor v Lembaga Kelayakan Profesion Undang-Undang* (2024), the Court of Appeal held that the LPQB acted beyond its statutory powers. The Federal Court subsequently refused leave to appeal, leaving the appellate interpretation undisturbed. Together, these decisions clarify the statutory limits of the LPQB and provide the factual foundation for examining why an unlawful regulatory position remained embedded for decades.

To analyse the LPQB episode through a regulatory governance lens, this article adopts three complementary theoretical frameworks. Ogas (1994) explains how delegation depends on clearly bounded authority and accountability mechanisms capable of constraining regulators. Baldwin, Cave, and Lodge (2012) identify criteria for regulatory legitimacy—particularly mandate clarity, proportionality, consistency, and transparency—that illuminate why the 1985 approach lacked governance credibility. Black (2001) provides the concept of interpretive drift, showing how regulatory practices can gradually diverge from statutory requirements where oversight is weak and institutional assumptions become entrenched.

Methodologically, the article uses a doctrinal-theoretical approach, combining statutory interpretation and case analysis with governance theory. It addresses three questions: (i) how the LPQB's 1985 decision exceeded its statutory authority; (ii) what governance failures enabled an ultra vires practice to persist for nearly forty years; and (iii) what reforms are required to prevent recurrence. The remainder of the article examines the statutory framework, the litigation and judicial reasoning, the theoretical framework, the governance-based analysis, and the reform proposals, before concluding.

### **Statutory Framework Governing the LPQB and the Articled Clerkship Scheme**

The LPQB is a statutory body whose powers are derived exclusively from the LPA. As a creature of statute, the Board possesses no inherent authority and may exercise only those functions expressly conferred upon it by Parliament. This foundational principle of administrative law frames the analysis of the LPQB's 1985 decision and the limits of its regulatory discretion.

### **Statutory Establishment and Functions of the LPQB**

The LPQB is established under Part II of the LPA as the authority responsible for determining qualifications for admission to the Malaysian Bar. Section 5 of LPA sets out the Board's principal functions, which include providing and regulating courses of instruction, conducting examinations, and supervising articled clerks. These functions are administrative and supervisory in nature. They are directed toward implementing the statutory scheme governing entry into the legal profession, not altering its substantive content.

Importantly, the statutory language does not confer any power upon the LPQB to abolish or suspend a qualification pathway created by Parliament. The Board's role is facilitative and regulatory: it gives operational effect to legislative choices concerning legal education and training. Any attempt to extinguish a statutory route would therefore exceed the scope of the Board's mandate.

### **Rule-Making Power under Section 6 LPA 1976**

Section 6 of LPA empowers the LPQB to make rules “for carrying into effect” the provisions of Part II of the Act. This rule-making power is ancillary and implementational. It enables the Board to regulate matters such as courses of instruction, examinations, and exemptions, but it does not authorise the modification or repeal of statutory provisions.

The phrase “for carrying into effect” has consistently been interpreted in administrative law as confining delegated legislation to matters of execution rather than policy substitution. Subordinate legislation may supplement or operationalise primary legislation, but it cannot override, amend, or nullify statutory schemes enacted by Parliament. Accordingly, even a formally made rule under s. 6 could not lawfully abolish articled clerkship. An administrative resolution falling short of formal rule-making stands on even weaker legal footing.

### **The Statutory Scheme for Articled Clerkship**

The articled clerkship pathway is comprehensively provided for in ss. 20–25 LPA. These provisions regulate eligibility, supervision, duration, and completion of articles, as well as the examinations required for qualification. Section 10(b) further empowers the High Court to admit as an advocate and solicitor any articled clerk who has complied with s. 25. Read together, these provisions establish articled clerkship as a complete and self-contained statutory route to legal practice.

Crucially, Parliament has never repealed or amended these provisions to remove articulated clerkship, despite introducing other qualification mechanisms and amending the LPA on multiple occasions. The continued presence of ss. 20–25 and s. 10(b) reflects a deliberate legislative choice to retain an apprenticeship-based pathway alongside other modes of qualification. Statutory silence in this context cannot be construed as implied repeal.

### **Statutory Limits and the Architecture of Delegation**

When ss. 5, 6, 10(b), and 20–25 are read together, the statutory architecture is clear. The LPQB is empowered to regulate the operation of articulated clerkship, not to determine its existence. The Act draws a firm distinction between Parliament's legislative authority to create or abolish qualification pathways and the Board's administrative authority to manage their implementation.

This distinction lies at the heart of the *ultra vires* finding in *Fahri, Azzat & Co*. The Court of Appeal confirmed that no provision of the LPA—whether express or implied—authorised the LPQB to abolish articulated clerkship, and that long-standing administrative practice could not displace clear statutory text. The statutory framework therefore admits of only one conclusion: the LPQB's 1985 decision lacked any legal foundation under the LPA.

### **The 1985 Decision and the Judicial Review Proceedings**

#### **The 1985 Administrative Resolution**

On 8 January 1985, the LPQB resolved administratively to discontinue the registration of articulated clerks. No rule was made under s. 6 LPA and the decision was not embodied in any instrument of subordinate legislation. Nor was it accompanied by a published rationale, consultation process, or any procedural safeguards ordinarily associated with rule-making. Nonetheless, the administrative resolution was treated in practice for decades as having extinguished a statutory qualification pathway expressly provided for in the LPA.

For decades thereafter, the LPQB proceeded on the assumption that articulated clerkship had been abolished. This assumption resurfaced formally in 2022 when the Board rejected an application to register an articulated clerk on the basis that the pathway had ceased to exist since 1985. The rejection crystallised a long-standing administrative position that had never been translated into legally effective rule-making.

#### **Proceedings in the High Court**

The applicants sought judicial review, contending that ss. 20–25 and s. 10(b) LPA remained operative and that the LPQB lacked power to abolish articulated clerkship. The High Court dismissed the application. It accepted the LPQB's reliance on long-standing administrative practice and inferred that subsequent developments in legal education—particularly the emergence of alternative qualification routes—had rendered articulated clerkship obsolete in substance.

This reasoning effectively privileged administrative practice over statutory text. By treating institutional acceptance as a proxy for legality, the High Court endorsed an implied displacement of clear legislative provisions without formal amendment or subordinate legislation. That approach would later be rejected on appeal.

#### **The Court of Appeal's Decision**

The Court of Appeal unanimously allowed the appeal in *Fahri, Azzat & Co*, holding that the LPQB had acted *ultra vires* the LPA. The Court's reasoning turned on several interrelated propositions.

First, the LPQB is a statutory body whose powers are confined to those conferred by Parliament. It possesses no inherent authority to alter the legal architecture of entry into the profession. Secondly, nothing in the LPA—whether expressly or by implication—authorises the abolition of articulated clerkship. Sections 20–25 and s. 10(b) remain in force, and Parliament's repeated amendments to the Act without repealing these provisions underscored a continuing legislative intention to preserve the pathway.

Thirdly, the Court rejected the argument that the LPQB's rule-making power under s. 6 could sustain the abolition. Rules made "for carrying into effect" the Act cannot be used to negate statutory schemes; still less can an informal administrative resolution achieve that result. Fourthly, the Court declined to accept post hoc justifications advanced during litigation, characterising them as afterthoughts inconsistent with the contemporaneous basis of the 2022 rejection.

The Court concluded that long-standing administrative practice cannot override clear statutory text, and that implied repeal has no place where Parliament has spoken with precision. The LPQB's 1985 decision was therefore unlawful and without legal effect.

### **Federal Court: Refusal of Leave**

On 7 October 2025, the Federal Court declined to grant leave to appeal. Although unreported, the refusal left the Court of Appeal's interpretation undisturbed and brought finality to the controversy. The refusal signalled that no question of law of public importance arose to warrant further consideration, and it cemented the appellate court's construction of the LPA as authoritative.

### **Doctrinal Significance**

The judicial trajectory in *Fahri, Azzat & Co* reflects a clear reassertion of foundational administrative law principles. The High Court's deference to institutional practice illustrated the risks of allowing administrative convenience to displace statutory command. The Court of Appeal corrected that course by reaffirming parliamentary supremacy, the limits of delegated authority, and the irrelevance of long-standing practice in the face of unambiguous legislation. The Federal Court's refusal of leave confirmed this settlement.

Together, these decisions supply the doctrinal anchor for the governance analysis that follows: the LPQB's position did not fail because it was poorly reasoned, but because it exceeded the legal authority conferred by statute and persisted in the absence of effective oversight.

## **THEORETICAL FRAMEWORK**

### **Regulatory Governance Perspectives**

This article analyses the LPQB's 1985 decision through a regulatory governance lens rather than a purely doctrinal one. While the Court of Appeal's ruling in *Fahri, Azzat & Co* resolves the legal question of ultra vires, governance theory explains how an unlawful regulatory position could arise and persist for decades without correction. Three complementary theoretical perspectives are employed: Ogus' account of delegated authority and accountability, Baldwin's standards of regulatory legitimacy, and Black's concept of interpretive drift.

### **Delegated Authority and Accountability: Ogus**

Anthony Ogus' theory of regulation emphasises that delegation is justified only where administrative discretion is constrained by clear statutory boundaries and effective accountability mechanisms (Ogus, 1994). Regulators are not autonomous policymakers; they are institutional agents tasked with implementing legislative choices. Where delegation is insufficiently bounded, regulators may assume powers never intended by Parliament, undermining both legality and legitimacy.

Applied to the LPQB, Ogus' framework highlights a failure of bounded delegation. The LPA confers upon the Board powers of regulation and administration, not legislative revision. The LPQB's assumption that it could abolish articulated clerkship reflects a collapse of the distinction between implementation and lawmaking. This was not merely a misinterpretation of the statute, but a governance failure in which accountability mechanisms—ministerial oversight, formal rule-making, and legal audit—failed to constrain regulatory action. Ogus' analysis thus situates the LPQB episode as a structural breakdown in delegated authority rather than an isolated administrative error.

## **Regulatory Legitimacy and Standards of Good Governance: Baldwin**

Baldwin's work on regulatory governance complements Ogus' structural focus by supplying criteria for evaluating the quality and legitimacy of regulatory decision-making. According to Baldwin, legitimate regulation requires clarity of mandate, proportionality, consistency, and transparency (Baldwin, 1995; Baldwin, Cave, & Lodge, 2012). These standards provide a normative benchmark against which the LPQB's conduct can be assessed.

Measured against these criteria, the LPQB's 1985 decision reveals multiple governance deficiencies. The abolition of a statutory pathway lacked mandate clarity, as no provision of the LPA authorised such an outcome. It was disproportionate in effect, eliminating an entire qualification route rather than adjusting its operation. It was inconsistent with Parliament's repeated retention of the articulated clerkship provisions. Most significantly, it was opaque: no consultation occurred, no reasons were published, and no formal rule-making process was followed.

Baldwin's framework therefore exposes why the LPQB's decision lacked regulatory legitimacy even before its illegality was judicially confirmed. The problem was not only that the Board exceeded its powers, but that it did so without satisfying the minimum procedural and justificatory standards expected of a modern regulator.

## **Interpretive Drift and Institutionalisation: Black**

Julia Black's theory of decentred regulation adds an institutional dimension to the analysis by explaining how unlawful regulatory practices can become normalised over time. Black (2001) describes "interpretive drift" as a process through which regulatory meaning shifts gradually away from statutory foundations, often through habit, organisational memory, and professional consensus rather than formal legal change.

The LPQB's treatment of articulated clerkship exemplifies this phenomenon. Although the statutory provisions remained unchanged, the Board's administrative assumption was internalised by the profession and left unchallenged for decades. The absence of formal oversight, combined with the authority associated with the LPQB's institutional position, allowed an informal interpretation to harden into perceived legal reality. As Black and subsequent scholars observe, such drift is particularly likely where regulators operate with limited transparency and weak external scrutiny.

This perspective explains why the LPQB's ultra vires position persisted despite clear statutory text: the issue was not ignorance of the law, but the institutionalisation of an erroneous interpretation in the absence of corrective governance mechanisms.

## **An Integrated Governance Perspective**

Taken together, these three frameworks reveal the LPQB episode as a layered regulatory failure. Ogus explains the breakdown of delegated authority, Baldwin exposes the absence of legitimate regulatory process, and Black accounts for the endurance of the error through institutional drift. The LPQB did not simply misapply the LPA; it operated within a governance environment that failed to discipline discretion, demand justification, or trigger timely review.

This integrated perspective provides the analytical foundation for the discussion in the Conclusion. It shifts the focus from the legality of a single decision to the systemic weaknesses that allowed an unlawful regulatory position to persist for nearly forty years, and it frames judicial intervention not as exceptional, but as a necessary corrective within a malfunctioning governance system.

## **Policy Implications and Governance Reforms**

The LPQB episode demonstrates that doctrinal correction alone is insufficient to prevent recurrence of regulatory failure. Although judicial review ultimately restored statutory fidelity, the persistence of the error for nearly four decades reveals weaknesses in the LPQB's internal governance, oversight architecture, and rule-making



discipline. The reforms proposed below respond directly to those institutional deficiencies and are tailored to the LPQB's statutory role under the LPA.

### **Reinforcing Statutory Fidelity within the LPQB**

A central lesson from *Fahri, Azzat & Co* is the need to entrench statutory fidelity as an internal governance norm within the LPQB. Given the Board's exclusive responsibility for determining entry qualifications, major policy decisions should be preceded by mandatory legal compliance reviews assessing alignment with the LPA. Such reviews should be documented and form part of the Board's deliberative record, particularly where decisions affect statutory pathways to qualification.

Embedding formal statutory checks would address the delegation failure identified by ensuring that the Board does not conflate administrative discretion with legislative authority. This measure responds directly to the absence of internal legal audit that allowed the 1985 assumption to persist unchecked.

### **Formalising Rule-Making and Ministerial Oversight**

The LPQB's reliance on informal resolutions underscores the need to formalise its approach to rule-making under s. 6 of LPA. Where the Board intends to regulate matters affecting qualification routes, it should do so only through properly made rules, supported by reasons, and publicly accessible.

This reform is not concerned with expanding the LPQB's powers but with disciplining their exercise. Formal rule-making would create visibility, trigger executive oversight, and provide clear points at which legality can be assessed. It would also prevent administrative assumptions from acquiring unintended normative force through silence or inertia.

### **Introducing Targeted Oversight and Periodic Review**

The endurance of the LPQB's ultra vires position highlights the absence of sustained external oversight. To counter institutional drift, the LPQB should be subject to periodic statutory compliance reviews conducted either by the relevant Ministry or an independent review mechanism. Such reviews should examine whether existing regulatory practices remain consistent with the LPA, particularly in relation to qualification pathways.

Periodic oversight would ensure that long-standing practices are revisited and tested against current statutory text, reducing the risk that outdated or erroneous interpretations become entrenched. This addresses the oversight gap identified and reduces reliance on judicial intervention as the sole corrective mechanism.

### **Clarifying Internal Decision-Making Procedures**

Internally, the LPQB should adopt clearer procedures governing how discretion is exercised in matters affecting entry into the profession. Decisions with structural implications—such as those affecting qualification routes—should require enhanced deliberative thresholds, documented reasoning, and express confirmation of statutory authority.

Such internal discipline would reduce the likelihood that administrative convenience or institutional habit substitutes for legal analysis. It would also improve institutional memory by ensuring that future Boards can trace the legal basis of past decisions rather than inheriting assumptions detached from statutory foundations.

### **Enhancing Stakeholder Communication and Transparency**

Finally, improved communication with stakeholders is essential to restoring trust and regulatory certainty. The absence of public explanation in 1985 meant that the profession accepted the LPQB's position without scrutiny. Going forward, the Board should communicate clearly when regulatory positions change, explain their legal basis, and invite engagement where appropriate.

Enhanced transparency would not only improve accountability but also create informal checks on interpretive drift by enabling practitioners, academics, and professional bodies to question regulatory assumptions before they harden into practice.

## CONCLUSION

The LPQB's purported abolition of articulated clerkship in 1985 and the four decades of administrative practice that followed present a compelling case study in regulatory failure, institutional drift, and the essential role of judicial review in preserving statutory fidelity. The LPA clearly establishes articulated clerkship as a statutory pathway to legal practice, and nothing within its text authorises the Board to abolish or modify that framework. Yet, through a combination of administrative assumption, opaque decision-making, and insufficient oversight, the LPQB operated for decades on the mistaken belief that its decision carried legal effect.

Using the governance frameworks of Ogus, Baldwin, and Black, this article has shown that the LPQB's conduct reflects a multi-layered breakdown in regulatory governance. Ogus' theory explains how the Board exceeded the scope of delegated authority, undermining the accountability mechanisms that justify administrative delegation. Baldwin's standards reveal how the decision lacked transparency, proportionality, and reasoned justification, thereby falling short of the criteria for legitimate regulatory action. Black's concept of interpretive drift illustrates how informal practices can evolve into entrenched institutional norms even when inconsistent with statutory text.

The judicial intervention in *Fahri, Azzat & Co*, and the Federal Court's refusal of leave to appeal on 7 October 2025, restored statutory alignment and reaffirmed core principles of administrative law: that Parliament alone possesses legislative authority, that delegated bodies must act within the limits of their enabling statutes, and that the courts serve as critical guardians of the rule of law.

Going forward, the LPQB must adopt governance reforms that reinforce statutory fidelity, improve transparency, enhance oversight, and prevent future instances of interpretive drift. Implementing structured rule-making protocols, conducting regulatory impact reviews, and strengthening internal and external accountability mechanisms will ensure that the Board's future decisions remain lawful, legitimate, and consistent with the purpose of the LPA.

The case offers a broader lesson for statutory regulators in Malaysia: administrative convenience cannot substitute for legal authority, and long-standing practice cannot supplant statutory command. Effective regulatory governance demands unwavering commitment to legality, accountability, and transparency. The LPQB's experience, therefore, serves as both a cautionary tale and an opportunity for systemic improvement—ultimately strengthening the integrity of professional regulation and the rule of law in Malaysia.

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