

Study of the legality of orthodontic practice by General Practice Dentists*

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Abstract

Objective: In view of the conflict in the Brazilian legal system between the principle of legality and the principle of human dignity with regard to the practice of orthodontics by General Practice Dentists, this study aimed to analyze the legislation and judgments passed by courts regarding this issue. **Methodology:** The authors conducted a survey of the legislation in the Federal Official Gazette and the competent authorities concerning the teaching and practice of orthodontics. As regards judgments passed, searches were performed in the Courts of Justice and the defunct Courts of Appeals in all Member States of the Federative Republic of Brazil, as well as the Superior Court of Justice and the Federal Supreme Court, using the keywords “Orthodontics”, “orthodontic” and “orthodontist”. **Results:** Brazilian legislation classifies postgraduate courses as strict sense (*stricto sensu*) or broad sense (*lato sensu*) courses, each with its own rules of operation. National Curriculum Guidelines provide that only Preventive Orthodontics be taught at the undergraduate level. It is the understanding of Brazilian courts that a postgraduate certificate is a prerequisite for the practice of Corrective Orthodontics. **Conclusion:** An undergraduate course in Dentistry is sufficient for the teaching of Preventive Orthodontics; only postgraduate programs in the strict and broad senses are competent to teach Corrective Orthodontics; any construal that legislation allows General Practice Dentists to practice Corrective Orthodontics is inconceivable; General Practice Dentists are only allowed to perform procedures comprised in the Preventive and Interceptive Orthodontics categories.

Keywords: Orthodontics. Postgraduation. Dentist. General practice dentist. Legality. Human dignity.

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INTRODUCTION

A Legal System is the single logical unification of the rules and legal principles in force in a given country¹³. The Federative Republic of Brazil is a Democratic State of Law governed by a set of overarching principles.

The principle of legality is set forth in Article 5, section II of the Federal Constitution (CF) and can be better understood through the following maxims: "The state is free to do whatever the law permits" and "The individual is free to do whatever the law does not prohibit." Zanobini³⁰ stated that, since the law is foreign to individuals, one should, in honor of their individual freedom, allow them everything that the law does not mediate or immediately restrict.

In keeping with this reasoning, upon first analysis one might be led to believe that the practice of orthodontics by General Practice Dentists is a lawful pursuit, since Law No. 5081/66, which regulates the practice of Dentistry, establishes that dentists are allowed to practice all acts pertaining to Dentistry which result from knowledge acquired in undergraduate or postgraduate courses, and Orthodontics has been in the curriculum of undergraduate Dentistry courses since 1856 with the title "Dental Orthopedics"²⁸. Furthermore, the Dental Code of Ethics prohibits the title of specialist to be granted without registration of the specialty with the Regional Council of Dentistry (CRO) and establishes that it is an Ethical violation to disclose or advertise titles, qualifications or skills that are not recognized by the Federal Council of Dentistry (CFO), although no further guidelines are provided regarding their practice.

This permission is a problem and the media²⁶, as early as 1995, warned about the growing number of victims of orthodontic treatment administered by professionals lacking the necessary expertise. These professionals were trained by what Petrelli²¹ refers to as the "Curses of Orthodontics", dentists who offer dental treatment and, in addition, orthodontic treatment without the required

scientific expertise²⁰.

Orthodontics is directly connected to human health²⁴. Damage caused by improper orthodontic treatment is not only a violation of the patient's body but it can also undermine their psychophysical integrity, which is an aspect of human dignity¹⁶. The principle of human dignity is expressly defined as a foundation of the Federative Republic of Brazil in Article 1, section III of the Federal Constitution.

The constitutional legal principles are the foundational, structuring values that circumscribe the boundaries of and provide a specific systemic rationality to a given Legal System⁹. Any conflicts arising from such principles can not be resolved by a mere hierarchical criterion, but require a Theory of Legal Argumentation⁹. In theory, the judge seeks arguments which are endowed with rationality and are substantially accepted by society, based on elements such as the law, theoretical grounds and court judgments to resolve each individual case¹.

In view of the conflict that exists in the Brazilian Legal System between the principles of legality and human dignity with regard to the practice of Orthodontics by General Practice Dentists, the purpose of this study is to review the legislation and the judgments passed by various courts on this subject using the Theory of Legal Argumentation.

MATERIAL AND METHODS

To understand any legal system, one must resort to the Science of Law, which consists of knowledge methodically coordinated, resulting from the orderly study of legal norms. This study allows one to grasp the objective meaning of said norms and build the legal system while discovering their social and historical roots¹³. According to this science, the Federative Republic of Brazil adopts the continental system or Civil Law, whereby the legislation is, in and of itself, the main source of the Law, rather than custom and legal

precedent¹³.

So, initially, the authors surveyed the legislations governing the teaching and practice of Orthodontics, in the Federal Official Gazette and competent authorities. Subsequently, these legislations were organized according to the continental system's hierarchy¹³, which uses a pyramid, on whose apex is the Constitution (which is the highest law), and below it are the Complementary Laws, Common Laws and Regulations.

As for the court judgments, the study was conducted on the website of the Courts of Justice and the defunct Courts of Appeals for all Member States of the Federative Republic of Brazil, as well as the Superior Court of Justice and the Supreme Court. The keywords used in the search were "Orthodontics", "orthodontic" and "orthodontist". From the results obtained after reading the summaries of law, were selected only the judgments that addressed the teaching or practice of Orthodontics.

RESULTS

Brazilian legislation on the teaching and practice of Orthodontics

The teaching of Orthodontics as a postgraduate course in Dentistry

The Federal Constitution in its article 197 states that health programs and services are of public relevance and the Government should therefore provide for their regulation, supervision and control, pursuant to applicable law. These programs and services shall be offered directly, through third parties or by individuals or private legal entities. Article No. 205, in particular, provides that education - a right of all citizens and a duty of the State and the Family - shall be promoted and encouraged with the cooperation of society, seeking the full development of the individual, who should be empowered to exercise citizenship and trained in a profession.

Law No. 9394/96 establishes the guidelines and foundations for Brazilian education, addressing

higher education in its Chapter IV. This chapter, in Article 44, item III, states that higher education includes postgraduate courses and programs including master's and doctoral courses, specialization courses, training and others, open to graduates from undergraduate courses that meet the requirements of educational institutions. As regards postgraduation in Orthodontics, Brazilian law allows only the analysis of Master's, doctoral and specialization courses.

Resolution No. 1/01 of the National Council of Education established standards for the operation of postgraduate courses, ruling that such courses are divided into: Strict sense (*stricto sensu*), which comprises the master's and doctorate programs offered only by duly authorized higher education institutions, which is subject to the assent of the Board of Higher Education of the National Council of Education, based on the results of assessments conducted by the Foundation for Coordination of Higher Education Personnel Training (CAPES) and approved by the Minister of Education; and broad sense (*lato sensu*), which refers to specialization courses offered by higher education institutions or institutions that are accredited to provide educational services at this level. These institutions must have a faculty consisting of at least 50% of teachers who hold a master's or doctorate degree obtained from recognized postgraduate programs, subject to the supervision of the competent authorities, effected during the reaccreditation of the institutions.

The CFO and CROs were established by Law No. 4324/64 and are regulated by Decree No. 68704/71. It is their duty to ensure and endeavor to uphold the good reputation of the profession. The CFO issues the resolutions that govern the practice of dental specialties.

Article 1 of Resolution 22/01 of the CFO provides that a specialty is a specific area of knowledge exercised by a professional qualified to perform more complex procedures in the pursuit of efficiency and effectiveness.

Orthodontics in stricto sensu postgraduate courses in light of legal parameters

Under Article 8, § 1 of Decree No. 3860/01, a higher education institution can only be considered as a university if it is capable of offering master's and doctorate programs on a regular basis, provided that these programs are approved by CAPES.

Every three years, CAPES carries out an assessment of the postgraduate courses assigning scores that range from 1 to 7. According to CAPES Ordinance No. 13/02, any program that is assigned a score of at least 3 is allowed to remain within the National Postgraduation System and shall have its diplomas validated by the Ministry of Education. Any program with scores 1 and 2 are barred from the National Postgraduation System and can no longer operate. Furthermore, their master's and doctorate programs are no longer recognized, which prevents the registration of new students. Only the diplomas delivered at the time when the institutions had a score of 3 or higher remain valid.

In the Greater Area of Health Sciences, which comprises master's and doctoral degrees in Orthodontics, the evaluation conducted for the 2001-2003¹² triennium used the following criteria: (1) Program Proposal; (2) Faculty; (3) Research Activities; (4) Training Activities, (5) Student Body; (6) Theses and Dissertations; (7) Intellectual Output.

Orthodontics in lato sensu postgraduate courses in light of legal parameters

The CFO is responsible for approving and monitoring lato sensu specialization courses in Orthodontics. Such responsibility is transferred to the CRO of the respective State, pursuant to CFO Ruling No. 08/02.

Resolution No. 22/01 of the CFO lays down standards on the advertising and performance of dental specialties and on specialized courses. Orthodontics courses are addressed in the following

articles:

- Article 49 requires a minimum course load of 1,000 hours for students to specialize in Orthodontics. § 3 provides that the course may be taught in one or more periods without exceeding 36 months. § 2 (amended by Resolution No. 38/03), determines that at least 10% of the classes must be theoretical and 80% practical.

- Article 50, § 1 requires that the coordinator of any of the specialization courses hold at least a master's degree from a CAPES-recommended postgraduate program; or the aforesaid degree should be revalidated by a higher education institution pursuant to the Federal Law of Guidelines and Bases for National Education (Lei de Diretrizes e Bases). The coordinator should also have teaching experience in the respective area of expertise in undergraduate and / or graduate Dentistry courses.

- Article 51 provides that the minimum qualification required of the faculty to teach in their respective area of expertise is a specialist certificate duly registered with the CFO.

- Article 53, § 3 requires that, after completion of the syllabus, students submit a thesis, within 30 days, before an examining board consisting of two examiners and a thesis advisor.

- Article 55 further stipulates that the institution offering the course shall only issue the certificate of specialization to students who have attended at least 85% of the course load in addition to achieving at least a 70% grade in a formal evaluation and having his / her thesis approved.

- Article 60 (amended by Resolution No. 26/02 and by Resolution No. 44/03) stipulates that for Orthodontics there will be an annual enrollment of students, either 4 or 6, depending on whether the course is taught in 3 or 2 year, provided that the total number of students in both classes does not exceed 12. In addition to these requirements, § 6 establishes that specialization courses shall only be recognized if there is a minimum of 1 teacher for every 4 students in the area of expertise.

The teaching of Orthodontics in undergraduate Dentistry courses

Formal Opinion No. 1300/01, issued by the National Council of Education / Board of Higher Education, lays down the curriculum guidelines for use in developing the curriculums that must be adopted by all institutions of higher education. This Opinion includes the National Curriculum Guidelines for Dentistry Courses.

The National Curriculum Guidelines for Dentistry Courses, which govern the training of Brazilian dentists, establishes in Article 3 that “Undergraduate Dentistry Courses aim to train Dentistry graduates to act as professionals with a comprehensive education imbued with human values, shall be critical and reflective and work at all levels of health care, grounded in technical and scientific rigor. These professionals shall be capable of pursuing activities related to oral health, shall embrace ethical principles and have a full understanding of their social, cultural and economic milieu, focusing their activities on the transformation of reality for the benefit of society.”

The only mention of Orthodontics in the Curriculum Guidelines is in Article 6, which describes the key ingredients of the Undergraduate Dentistry Course, stating that it must cover the entire health-disease process of citizens, families and community, attuned to the local epidemiological and professional reality. Orthodontics is mentioned in Dental Sciences only in the following context: “C) Pediatric Dentistry, which shall impart knowledge of pathology, clinical dental pediatrics and preventive orthodontic measures.”

The Stance of the Brazilian Board of Orthodontics and Dentofacial Orthopedics

The CFO has issued Decree No. 27/03, appointing the Brazilian Association of Orthodontics and Dentofacial Orthopedics (ABOR) as CFO’s consultant on matters pertaining to the specialty of Orthodontics.

Driven by the need to establish standards of

excellence in the clinical practice of Orthodontics and Facial Orthopedics, in October 1998, ABOR created the Committee for Implementation of the Orthodontics Specialist Examination⁴. The committee presented a project for the implementation of the Brazilian Board of Orthodontics and Dentofacial Orthopedics (BBO) during the 2nd ABOR Conference, held in October 1999 in Florianópolis⁴. The project was discussed and evaluated at a general assembly of ABOR’s Board of Directors and was approved with the support of all of its members⁴.

With regard to the teaching and practice of Orthodontics, two BBO goals should be highlighted: “e) Provide the community with the information needed to evaluate the specialized Orthodontics and Facial Orthopedics services and care available to it” and “g) Evaluate, on request, the agencies and institutions that train specialists in Orthodontics and Facial Orthopedics, being authorized to disclose the scores assigned to those that meet the requirements of excellence established by the BBO, which may, in this case, certify the excellence of the course (“seal of quality”).”

The professional practice of Orthodontics

Article 5, paragraph XIII of the Constitution provides that citizens are free to pursue any work, trade or profession, subject to meeting the applicable professional qualifications established by law.

In the case of Dentistry, compliance with Law No. 5081/66 is required. This law regulates the practice of Dentistry and determines, in Article 6, paragraph I that dentists are allowed to perform all acts pertaining to Dentistry, which may result from knowledge acquired in a regular or postgraduate course.

Article 3 of CFO’s Resolution No. 22/01 stipulates that in order to enable a dentist’s registration as a specialist, the dentist should: Hold a master’s degree, be a certified teacher or hold a doctor title in the area of specialty, achieved through courses that meet the requirements of the National

Education Council; or hold a certificate or diploma awarded through a specialist course or residency program in Dentistry that meets the requirements of the CFO.

The Dental Code of Ethics only prohibits, in article 16, specialist titles whose specialty has not been registered with the Regional Council. The Code also construes as a breach of ethics, in Article 34, section II, the advertising or promotion of titles, qualifications or skills not held by the professional or not recognized by the CFO.

Court judgments regarding the practice and teaching of orthodontics

The Fifth Civil Chamber of the Court of Appeals of Minas Gerais State acknowledged the liability of any dentist who, despite not having a specialist title, has performed orthodontic treatment:

“Civil liability - Dentist - Orthodontics - Accreditation - service provision - contractual clause - disciplinary proceedings - professionals who use inappropriate materials and physiotherapy equipment are civilly liable for damages resulting from orthodontic treatment, since such liability arises from professional negligence or malpractice. - Legal accreditation, by itself, does not authorize the practice of Orthodontics since it is vital that professionals possess the expertise acquired through specialization”¹⁵.

In the First Civil Chamber of the defunct Court of Appeals of Paraná State, this same understanding is found:

“Legal action for damages - civil liability - dentist - Orthodontics - accreditation - service provision - conclusive expert evidence that the procedure adopted by the professional was not suitable for the correction of TMJ (temporomandibular joint dysfunction) - periodontal disease - neglect in the care required during orthodontic treatment - malpractice - no evidence of specialization - guilt - appeal dismissed.

1. Any professionals (dentists) who do not take

the necessary precautions in the practice of their profession, acting with recklessness, negligence and malpractice and causing serious damage to patients shall be civilly liable for damages resulting from orthodontic treatment.

2. Legal accreditation, by itself, does not authorize the practice of Orthodontics since it is vital that professionals possess the expertise acquired through specialization.

3. In contracts for medical and dental services, a clause ensuring the intactness of the patient is implicit, entailing the *devoir* to fulfill the professional obligation without producing damage or deterioration of the patient’s health, except for circumstances in which such risk is necessary, provided prior consent is given by patient or patient’s family¹⁸.

The defunct Court of Appeals of Paraná State also issued a ruling in the First Criminal Chamber, stating the understanding that the practice of orthodontics by General Practice Dentists does not constitute a criminal offense:

“Ex officio” appeal. Article 282 of the Penal Code. Dentist. Practice of Orthodontics. Competence. Legal authority. Unusual fact. Order granted. Appeal dismissed”¹⁹.

Even being an expert in another area does not enable a professional to practice Orthodontics and, if treatment is unsuccessful, he / she shall be liable for material and moral damages, as indicated by the Fifth Civil Chamber of the Rio Grande do Sul State Justice Court:

“Civil appeals. Orthodontics. Treatment failure. Professional lacked expertise in the area. Clear case of material and moral damages. Interest accrual. Once a dentist’s professional malpractice has been established, especially if such malpractice was caused while venturing into a specific and complex area for which such dentist lacked expertise, i.e. Orthodontics, he / she shall be liable for the payment of material and / or moral damages. The unusually lengthy treatment period to which the patient was subjected further supports

this finding, since follow-up lasted more than 5 years instead of the usual 24 months, on average. Moreover, tipped teeth can be seen in both arches. This court further determines, however, for reasons not stated herein, that the payment of 1% interest, accrued monthly, shall be due and payable since, from the date that the Civil Code of 2002 entered into force, the adoption of such percentage has been a logical corollary. Any appeal by the defendant is hereby dismissed. Appeal by the plaintiff is hereby admitted²⁵.

DISCUSSION

An analysis of Brazilian legislation shows that the CFO, which is responsible for protecting and promoting the good reputation of the profession, believes that dental specialties must be conducted by professionals who are qualified to perform more complex procedures, or by professionals trained in postgraduate courses. *Stricto sensu* postgraduate courses are subject to CAPES inspection, whereas *lato sensu* courses are under CFO responsibility.

The National Curriculum Guidelines for Dentistry Courses require that undergraduate Dentistry courses emphasize the teaching of Preventive Orthodontics, which is perfectly compatible with the current Health Promotion Paradigm²⁹. This paradigm has yielded positive results, confirmed by the latest Brazilian Oral Health Survey⁶ and the Smiling Brazil Program currently underway in Brazil. The Curriculum Guidelines are a conceptual framework determined by external and social relations, including professional ideology, international influences, relationship of health professionals within the society, and the structure and socio-economic context at any given time and / or historical context²⁷.

Thus, since it is the responsibility of Preventive Orthodontics to oversee and guide the development of an efficient masticatory apparatus, balanced from morphological, aesthetic and functional points of view¹¹, it does not include any issues related to Corrective Orthodontics. At most,

one can claim that preventive and interceptive procedures are often confused since together they are named procedures of Phase I of Orthodontics⁸. So it came as no surprise that Haag and Feres¹⁴ found, regarding the teaching of Orthodontics in undergraduate Dentistry courses, that: There is no uniform name for the Discipline in both federal and private colleges; the frequency of the discipline varies from half-yearly to yearly; the content of the program introduces basic theoretical and practical concepts, varying in the extent of the issues addressed and is proportional to the course load; the course load varies, both comparing federal to private institutions, and comparing federal and private institutions among themselves; and none of the undergraduate programs adequately qualifies professionals for the full practice of Orthodontics as a specialty. A postgraduate degree is a necessary requirement.

Despite the fact that the legislation makes it perfectly clear that Corrective Orthodontics can only be taught by postgraduate courses, in actuality, courses are offered with denominations such as “professional upgrade” or “professional development” courses. According to Petrelli²², some of these courses are taught on weekends, with a course load of 4 to 8 hours and are not qualified to prepare professionals for the practice of Corrective Orthodontics.

Besides these, there is also what Petrelli²¹ refers to as the “Curses of Orthodontics”, which are Typodont courses taught in private clinics using names such as Centers, Foundations, Nucleus, etc., as well as courses offered by certain Schools of Dentistry. These “curses”, in addition to dental treatment, also offer orthodontic treatment without the necessary scientific qualification²⁰. Within this context, some associations, such as the Goiânia Association of Orthodontics², disapprove of and denounce these clinics.

The BBO was created along the lines of the American Board of Orthodontics, founded in 1929 with the goal of raising the quality standards

of Orthodontic practice⁷. Therefore, in keeping with these objectives the BBO seeks to clarify the community regarding the evaluation of specialized orthodontic care and services. The fact that the BBO undertakes to evaluate the institutions that train orthodontists demonstrates that the quality of education is crucial for the quality of orthodontic services.

The statement that based on the principle of legality the law allows General Practice Dentists to practice Orthodontics can not prosper because when it comes to orthodontic treatment one is dealing with the principle of human dignity. According to Bernardo³, the principle of human dignity shall not yield in the face of any other principle and shall serve as a criterion for resolving any conflict of principles: Eventually, the best possible solution shall be the one that conforms to the principle of human dignity.

When Law No. 5081/66 grants General Practice Dentists the right to practice all the knowledge acquired in regular as well as postgraduate courses, it is understood that such practice shall occur only in courses that have some measure of control and, in the case of Corrective Orthodontics, only *stricto sensu* and *lato sensu* postgraduate courses are covered by legal documents that establish quality parameters. Similarly, when the Dental Code of Ethics does not prohibit the practice of specialties, it does so in the belief that professionals will only practice that for which they have been properly prepared. This interpretation is flawless since Article 197 of the Constitution stipulates that it is the responsibility of the Government to regulate, oversee and monitor health activities. The quality of orthodontic treatment is a public health issue because inappropriate treatment of a malocclusion can lead to irreparable damage¹⁰ and it has been proved that General Practice Dentists tend to treat less severe cases than the average and finish these cases worse than the average professional holding a postgraduate degree in Orthodontics²³. Moyers¹⁷ stated that it

is inconceivable that two disparate levels of orthodontic treatment quality should coexist: On the one hand, that of the specialist (more complex and more expensive) and, on the other, the non-specialist or General Practitioner (simpler and cheaper), for treatments should always meet high standards.

A review of court judgments shows that, even for Law officials, corrective orthodontic treatment requires postgraduate training focused specifically on Orthodontics. However, when a General Practice Dentist performs corrective orthodontic treatment unsuccessfully, such GP will be civilly liable (i.e., pecuniary damage), but not criminally liable (i.e., no restrictions to freedom). Similarly, Bill No. 5479/01⁵ - currently awaiting the justice's opinion - amends Article 2 of Law No. 5081/66 and sets forth other provisions, establishing that the practice of Orthodontics as a specialty shall only be allowed to graduate dentists who have attended a specialization course.

CONCLUSIONS

By using the Theory of Legal Argumentation, the interpretation of the law and a review of court judgments the authors have concluded that:

- 1) Undergraduate Dentistry Courses are legally competent to teach Preventive Orthodontics.
- 2) Only *stricto sensu* and *lato sensu* postgraduate courses are legally competent to teach Corrective Orthodontics.
- 3) Any construal of the law indicating that General Practice Dentists are legally competent to practice Corrective Orthodontics is inconceivable.
- 4) General Practice Dentists can only perform procedures that are included in the category of Preventive and Interceptive Orthodontics.

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