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<https://doi.org/10.1057/s41599-026-06847-3>

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Altruistic surrogacy and institutional non-viability: regulatory design lessons from Portugal

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Altruistic surrogacy is often presented as a regulatory compromise reconciling ethical concerns with access to assisted reproduction. In practice, however, some altruistic-only regimes fail to provide a legally usable framework. This article examines conditions under which surrogacy regulation becomes institutionally non-operable, producing legal availability without practical access. Focusing on Portugal, it shows how repeated legislative intervention, and regulatory non-implementation prevent a stable pathway from authorisation to legal parentage. Drawing on legal analysis informed by institutional and economic reasoning, the article examines how altruistic restriction, strong protection of gestational autonomy, and centralised administrative authorisation increase transaction costs, undermine legal certainty, and distort reproductive labour allocation. The Portuguese experience highlights a broader challenge: when regulatory design prioritises restrictive safeguards while excluding engagement with compensation and incentives, the framework may lack operability. The article derives lessons on legal design, enforceability, and institutional incentives, showing that viable surrogacy regulation requires attention to operability and economic dimensions of reproductive governance.

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Introduction

Surrogacy, a form of assisted reproductive technology (ART), separates gestation from genetic parenthood and requires legal systems to determine parentage through intention and regulation (Deharo and Madanamoothoo, 2020; Joseph et al., 2018; van Zyl and van Niekerk, 2000). Beyond ethics and law, surrogacy is shaped by incentives and institutional constraints affecting access and participation.

Regulatory approaches to surrogacy vary widely across jurisdictions (Conde et al., 2024; Payne et al., 2020). Some countries permit regulated commercial arrangements, others allow only altruistic surrogacy, and many prohibit the practice altogether. This fragmentation has contributed to cross-border practices in which legal uncertainty (Trimmings and Beaumont, 2011), ethical disagreement, and economic incentives intersect. Where altruistic-only frameworks are adopted, compensation is formally excluded but often informally present, creating regulatory grey zones that raise coordination costs, heighten cross-border displacement, and complicate surrogate protection. These dynamics illustrate the limits of ethical justification alone in securing institutional operability.

This article focuses on a specific regulatory problem: the institutional non-viability of restrictive altruistic surrogacy regimes. While such frameworks are frequently justified on ethical grounds, they may fail to generate workable institutional pathways from authorisation to legal parentage, thereby producing uncertainty for surrogates, intended parents, and children. From an institutional-economic perspective, the interaction of procedural density, centralised administrative control, and time-sensitive consent structures can undermine the feasibility of mutually beneficial arrangements, even where the ethical motivations of the framework are defensible (Posner, 1989; Trebilcock and Keshvani, 1991). Rather than preventing market dynamics, these regimes may displace reproductive labour into opaque reimbursement practices or cross-border arrangements, with distributive and ethical consequences that are rarely addressed explicitly in regulatory design.

Portugal provides an instructive illustration of this problem. Although the Portuguese legislature formally permitted altruistic surrogacy subject to strict safeguards, constitutional review, legislative revision, and the absence of effective implementing mechanisms have rendered the framework largely inoperable in practice. The Portuguese experience thus demonstrates how legal permissibility can become decoupled from institutional usability, highlighting the importance of integrating legal design with economic and social considerations.

Against this background, this article asks whether restrictive altruistic surrogacy regimes can protect women and intended parents in practice, or whether a regulated commercial model offers a more coherent legal and economic design. It examines whether recognising surrogacy as a form of reproductive labour within a regulated commercial framework can improve institutional operability, clarify legal relationships, and align incentives with surrogate protection more effectively than altruistic-only models.

Using Portugal as an illustrative jurisdiction, the paper integrates economic analysis, legal evaluation, and feminist scholarship on reproductive labour. Portugal provides the case study through which the article tests institutional operability as a regulatory threshold rather than as an empirical performance measure. A restrictive, altruistic-only framework was introduced in 2016, yet key provisions were subsequently declared unconstitutional, and later legislative revisions have remained practically inoperative due to the absence of the implementing regulation required for the post-2021 model (Raposo Vera, 2020). The Portuguese position is therefore best characterised as a form of

legal permission whose operability remains contingent on missing secondary regulation and an administratively managed authorisation route. Rather than engaging in empirical or systematic comparative methodology the article advances through normative legal analysis informed by institutional and economic reasoning. It also proceeds from a position of ethical reservation - it does not assume that surrogacy is morally unproblematic, nor that regulatory refinement can resolve the deeper concerns it raises. In doing so, it contributes to the literature by:

1. Identifying institutional non-viability as a central but under-examined weakness of altruistic-only surrogacy regimes, including the economic and incentive structures that limit operability.
2. Demonstrating how the Portuguese experience reveals the distributive and transnational effects of restrictive regulatory design.
3. Arguing that explicit engagement with compensation, transaction costs, and market dynamics is necessary for any surrogacy framework aimed at operability, protection, and legal certainty.

Throughout, the article maintains an interdisciplinary lens, linking juridical reasoning with economic analysis to examine how design choices - authorisation, consent architecture, parentage mechanisms, and implementation - affect both the ethical and operational outcomes of surrogacy regulation.

Regulatory approaches to surrogacy and institutional operability

Comparative scholarship on surrogacy regulation commonly groups legal approaches into three broad positions: prohibition, permission under altruistic-only conditions, and permission under regulated compensation (Payne et al., 2020). These positions are frequently defended through ethical reasoning, including concerns about commodification, exploitation, and the protection of women's bodily autonomy. Regulatory positioning, however, does not settle the institutional question. A formally permissive regime can still fail to generate a stable pathway for initiating, carrying through, and legally concluding an arrangement, leaving surrogacy legally available while practically inoperative.

For the purposes of this article, *institutional operability* refers to the capacity of a legal framework to sustain surrogacy as a lawful practice that can be commenced, completed, and legally closed without systematic recourse to informal workarounds or cross-border displacement. In this sense, institutional operability reflects established concerns in public law and regulatory theory regarding enforceability, legal certainty, and administrability (Baldwin et al., 2012; Black, 2002; Craig, 2023; Fuller, 1969; Raz, 1979). Law can thus be read as part of the infrastructure that enables markets and organisations to function predictably, providing the institutional technology through which commitments become enforceable (Hadfield, 2016). From an institutional-economic perspective, this infrastructure shapes transaction costs, risk allocation, and participation incentives, particularly where coordination depends on time-sensitive reproductive decisions.

Institutional operability is also shaped by institutional-economic constraints. Where a framework relies on prior authorisation, dense procedure, and time-sensitive decisions, transaction costs rise and incentives shift towards avoidance strategies, including informal ordering and cross-border displacement. Questions of enforceability then become design-relevant: the legal system's capacity to supply predictable consequences affects participation, risk allocation, and the

credibility of oversight. Economically, these conditions influence efficiency: where regulatory friction prevents coordination between willing participants, potential welfare gains remain unrealised, even if ethical safeguards are formally satisfied. Market-limits scholarship further clarifies how constrained choice can distort the meaning of ‘consent’ even when formal voluntariness is preserved (Coase, 2006; Posner, 1989; Satz, 2010; Trebilcock and Keshvani, 1991).

The claim is structural and design based. It does not depend on empirical assessment of outcomes for children or participants. A framework becomes institutionally non-viable where its internal architecture prevents it from functioning as a usable regulatory route, even when its ethical motivations are intelligible.

A first design implication follows. An operable surrogacy regime tends to require a limited set of functional conditions: a pre-conception authorisation route with identifiable decision-making authority and criteria; a mechanism for securing parentage within a predictable timeframe following birth; a clear allocation of legal and financial risk across pregnancy and birth; and a workable framework for dispute resolution and legal consequences, including the status of agreements and the effects of withdrawal. These are institutional thresholds. Where they fail cumulatively, legal uncertainty becomes structural, and the pathway becomes fragile.

That fragility has consequences beyond the domestic system. Comparative work on cross-border surrogacy suggests that when domestic regimes cannot be used with reasonable predictability, demand often persists and is displaced into foreign jurisdictions or informal arrangements, sometimes accompanied by weaker safeguards and heightened risks of legal non-recognition (Deharo and Madanamoothoo, 2020; Trimmings and Beaumont, 2011). From a social-reproduction perspective (Mezzadri et al., 2022; Naidu, 2023; Vertommen and Barbagallo, 2022), such displacement externalises both the care work and legal risks associated with surrogacy, highlighting how restrictive regimes can generate unintended distributive effects across jurisdictions. Operability therefore matters as a regulatory attribute in its own right: a nominal framework that cannot be used tends to externalise the practice.

The pressure points become particularly visible in altruistic-only models. These regimes typically exclude compensation beyond expenses to reduce the risk of commodifying reproduction. They also often pursue strong protection of gestational autonomy through broad withdrawal rights and intensive oversight. Each element can be defended on ethical grounds. The practical difficulty arises from their interaction over time. Excluding compensation is likely to narrow participation and to increase the system’s sensitivity to procedural friction, which in turn raises the cost of failure for the authorisation route (Posner, 1989; Trebilcock and Keshvani, 1991).

Expansive revocability provisions, especially when extending close to birth or into the post-birth registration period, increase uncertainty precisely when reliance interests become most acute. Centralised administrative authorisation can further reduce usability where procedural density combines with institutional risk aversion. In economic terms, these features amplify *ex ante* uncertainty and reduce the credibility of commitments, raising the cost of participation and increasing the likelihood of avoidance strategies, including informal ordering and cross-border displacement. The result can be a regime that remains permissive on paper while struggling to function as a practicable route.

A further tension emerges in jurisdictions operating ‘expenses-only’ frameworks. When compensation is excluded as a formal category, financial transfers often reappear through expanded reimbursement categories, including lost income, ancillary costs, and indirect burdens. Money remains present while its legal

visibility and dispute-handling clarity can weaken, particularly around what is permitted, provable, and protected (Coase, 2006; McEwen, 1999; Satz, 2010). From an efficiency standpoint, poorly defined reimbursement mechanisms can undermine Kaldor-Hicks efficiency: intended parents and surrogates may be unable to reach mutually beneficial outcomes despite the formal framework permitting the activity.

Portugal does not provide assessable practice on this point, given the persistence of inoperability. The relevance here is architectural: the tendency of altruistic restriction to generate ambiguity around financial flows operates as a design constraint that bears on operability.

Against that background, demand persistence becomes a central parameter. Surrogacy demand is sustained by a bounded set of circumstances, including absolute or functional infertility, medical contraindication to pregnancy, and the pursuit of parenthood by individuals and couples for whom gestation is infeasible. Infertility is widely recognised as a significant health condition with a substantial psychosocial burden, supporting the expectation that demand may persist even where legal pathways are narrow or unstable (Inhorn and Patrizio, 2015; WHO, 2024). This sustained demand under conditions of high transaction costs explains why informal and cross-border markets emerge despite formal restrictions. The effect is not to eliminate surrogacy, but to alter its institutional location.

Adoption is also a limited substitute in many jurisdictions. Restrictive eligibility criteria, lengthy procedures, and a limited number of adoptable children often constrain adoption as a practical alternative. When surrogacy is formally permitted yet institutionally unusable, displacement becomes more likely, including into cross-border arrangements with corresponding legal and ethical risks (Payne et al., 2020; Trimmings and Beaumont, 2011). This displacement effect is therefore part of the operability assessment.

Ethical principles remain central throughout this analysis. The familiar bioethical principles of autonomy, beneficence, non-maleficence, and justice (Beauchamp and Childress, 1979) shape the permissible design space. In institutional terms, they operate as constraints that law must implement through mechanisms capable of carrying an arrangement from initiation to legal closure.

The point is not that ethical protection lacks value, but that it needs legal architecture that can deliver predictability, risk allocation, and enforceability across the relevant timeline.

This becomes most visible in the internal tensions within ‘autonomy’ as a regulatory value. Surrogacy distributes decisional authority across at least three legal subjects whose interests do not align seamlessly: the surrogate as the pregnant person, the intended parent(s) whose reliance interests crystallise across pregnancy, and the child whose status should not be suspended by design. A framework that treats autonomy solely as a pre-conception choice risks under-specifying later stages where pregnancy-related decisions, withdrawal, and registration produce conflict, with consequences for transaction costs, allocative efficiency, and participation incentives. Ethical protection, therefore, requires time-sensitive legal mechanisms, including defined consequences of withdrawal and interim responsibility rules, so that the child’s legal position is not left contingent on institutional improvisation (Beauchamp and Childress, 1979; Campbell, 2000; Sifris, 2015).

The next section takes Portugal as the worked example and unpacks the authorisation-centred architecture through which surrogacy was meant to become legally usable. It traces how four coupled mechanisms - pre-conception authorisation, constrained agreement form, time-structured consent, and parentage/civil-registration allocation - were destabilised by constitutional review

and then left without an administrable route once implementation stalled.

Portugal as a case of legal availability without institutional operability

Portugal is a particularly clean case for analysing institutional operability because the framework has remained effectively inoperative despite repeated legislative intervention. That feature shifts the emphasis away from contested empirical claims about domestic practice and towards legal architecture. The question becomes how a jurisdiction can adopt a formally permissive position while failing to generate a usable pathway for initiating an arrangement, carrying it through pregnancy, and closing it legally through secure parentage.

The Portuguese sequence is important because it shows how operability can be lost through the interaction of legislative design, constitutional review, and non-implementation. After Law No. 32/2006 (Portuguese Republic, 2006) set the baseline PMA regime, the 2016 reforms proceeded in tandem: Law No. 17/2016 widened access to PMA (Portuguese Republic, 2016a), and Law No. 25/2016 (Portuguese Republic, 2016b) introduced gestational surrogacy on an altruistic-only basis, with centralised prior authorisation through the National Council for Medically Assisted Procreation (CNPMA) and a written agreement model.

This 2016 framework was adopted under heightened ethical scrutiny. On 7 June 2016, the President vetoed (*Presidência da República Portuguesa n.d.*) the parliamentary decree (*Assembleia da República n.d.*) on surrogacy submitted for promulgation, stating that it did not incorporate the cumulative conditions articulated by the CNECV. Following parliamentary reconsideration, he promulgated the reformulated decree on 30 July 2016 (*Presidência da República Portuguesa n.d.*). The framework was published as Law No. 25/2016 on 22 August 2016 (Portuguese Republic, 2016b).

The law entered into force on 1 September 2016, although the amendments to arts. 8.º and 39.º were made dependent on the implementing regulation under art. 3.º. The regulation was issued in July 2017 (*Ministério da Saúde n.d.*). Constitutional review later invalidated key elements of the scheme, and subsequent legislative revision has not restored operability. The current model remains dependent on a further regulatory decree that has not been issued, leaving the formal route unusable in practice.

A draft decree-law intended to implement Law No. 90/2021 reached the Presidency in January 2024 but was returned without promulgation, confirming that operability continues to hinge on the secondary regulatory layer and on the institutional dynamics that determine its enactment.

In design terms, the 2016 (Portuguese Republic, 2016b) framework rested on four coupled mechanisms. First, entry is channelled through pre-conception administrative authorisation by the CNPMA, granted on the basis of statutorily defined eligibility and documentation requirements, with approval operating as the gate to any lawful arrangement (art. 8(4)). Second, surrogacy proceeds through a written agreement whose legal status is tightly constrained by public-law control, including the requirement of prior approval and limits on the parties' capacity to pre-allocate pregnancy-related decisions, reflected in the ban on clauses that impose restrictions on the surrogate's conduct or undermine her autonomy (art. 8 (10, 11)). Third, the framework relies on a time-structured consent architecture, in which consent could be revoked up to the start of ART procedures and was then meant to become fixed. Fourth, the intended allocation of parentage and civil registration depends on the interaction between the authorised agreement and post-birth registration rules, with the statute treating the child as the child of the beneficiaries (art. 8

(7)), which makes legal closure especially sensitive to late-stage conflict and institutional delay (Trimming and Beaumont, 2011).

This architecture was directly disrupted by constitutional review. In 2018 (*Tribunal Constitucional n.d.*), the Constitutional Court declared unconstitutional, with generally binding force, the authorisation-and-contract core of the regime (art. 8.º, n.ºs 4, 10 and 11, with consequential effects on art. 8.º, n.ºs 2 and 3), the limitation on revocation of the surrogate's consent (art. 8.º, n.º 8, in conjunction with art. 14.º, n.º 5, in the relevant part), and the agreement-related rule in art. 8.º, n.º 12. It also invalidated parts of the confidentiality regime (art. 15.º, n.º 1, in part, and art. 15.º, n.º 4).

In 2019, the Court again held unconstitutional the attempted reintroduction of the consent-limitation rule, relying on the same rights-based logic concerning disproportionate restriction of the surrogate's personal development and family-formation rights (*Tribunal Constitucional n.d.*).

These interventions did not merely remove peripheral detail; they struck at provisions that anchored the timeline of consent, information, and legal certainty. From an economic standpoint, this legal instability further increases uncertainty costs for intended parents and surrogates, reinforcing the structural inefficiency of the altruistic-only model. The Portuguese trajectory illustrates how constitutional standards concerning determinacy, legal certainty, and protection of the surrogate's position can destabilise a model that already depends on administrative filtering and altruistic restriction. The effect was a framework that remained formally permissive while lacking a workable institutional pathway that participants could rely upon. From a social reproduction theory perspective, this situation underscores how undervaluing reproductive labour structurally affects women's economic agency and reinforces power asymmetries, even within ethically motivated regulatory designs.

Legislative revision followed. Law No. 90/2021 (*Portuguese Republic n.d.*) sought to respond to the Constitutional Court's concerns by tightening safeguards and recalibrating consent and withdrawal, including rules that extend the surrogate's withdrawal window into the birth-registration horizon. The revised model also reinforced counselling and adjusted the operational features of the authorisation-centred route. That design choice matters institutionally. Extending revocability deep into the timeline increases uncertainty at the point where intended parents' reliance interests are most acute and where the child's legal position becomes time sensitive. Because the architecture remains authorisation-centred, operability is still contingent on implementing regulation capable of specifying procedure, criteria application, and timelines; absent that layer, formal permission fails to translate into an administrable route (Raposo Vera, 2020).

On paper, the configuration appeared to address several operability thresholds identified in the preceding section. It signalled a pre-conception authorisation route, contemplated a formal agreement, and placed the practice within a supervised clinical environment. The point of failure lay in the interaction between authorisation, consent across time, and the legal mechanics of parentage. Once forced into a coherent timeline, the framework struggled to provide a stable route from initiation to legal closure.

The design question is not whether withdrawal protection is ethically justified in the abstract; it is whether the surrounding architecture supplies a route to resolution capable of delivering legal closure without prolonged limbo for the child and without systematic pressure towards informal workarounds (*Portuguese Republic n.d.*; Raposo Vera, 2020). In terms of reproductive economics, the absence of effective closure mechanisms displaces reproductive labour into less regulated or cross-border arenas,

creating inequalities and exposing surrogates to economic and social risks (Satz, 2010).

A further institutional feature amplified the framework's fragility: operational dependence on implementing regulation. Even where statutory text allocates authorisation functions and defines eligibility, a regime built around centralised prior approval requires procedural rules capable of consistent application. In Portugal, the absence of the necessary implementing decree has meant that the formal legal route has not translated into an operational one.

Seen through an operability lens, the Portuguese experience concentrates three interacting constraints. First, an altruistic-only model narrows the participation base and increases sensitivity to procedural friction, effectively limiting supply in the reproductive labour market. Second, extensive protection of the surrogate's decision-making authority across time makes legal certainty dependent on carefully designed parentage mechanisms and time-bound resolution pathways. Third, centralised administrative authorisation renders the entire scheme vulnerable to institutional risk aversion, procedural density, and gaps in implementation. Each element is defensible in isolation. Their interaction, however, in a setting where constitutional review presses for heightened safeguards and legal certainty, has produced a framework that remains legally articulated yet institutionally non-viable. This interaction can also be understood through the lens of reproductive labour economics: limiting compensation and enforcing altruistic-only models reduces the effective supply of surrogate labour, creating scarcity and incentivising displacement into informal or cross-border arrangements. Feminist scholarship underscores that ignoring the labour dimension of surrogacy obscures the physical and socio-economic costs borne by surrogates, with implications for institutional efficacy (Vertommen and Barbagallo, 2022).

This configuration also clarifies what 'legal availability' means in practice. It is not equivalent to access. It denotes formal permission without a reliable domestic pathway. In comparative terms, that pattern tends to externalise the practice through cross-border arrangements, with corresponding difficulties of recognition and heightened exposure to legal non-recognition at the point where parentage must be secured. Portugal's inoperability makes that displacement risk structurally intelligible, even without reliance on domestic empirical outcomes (Raposo Vera, 2020; Trimmings and Beaumont, 2011). Economically, this highlights a market displacement effect: by failing to operationalise the domestic framework, the policy pushes intended parents toward international markets, where transaction costs may be lower but ethical and protective safeguards for surrogates are often weaker. The reproductive bioeconomy framework helps to understand this dynamic, situating surrogacy within a system where labour, legal enforcement, and financial incentives intersect (Hackfort and Saave, 2024).

The analysis, therefore, turns to the specific institutional choke points: the design of the authorisation route, the treatment of consent and withdrawal across the pregnancy timeline, the mechanism for securing parentage and civil registration, and the consequences of regulatory non-implementation for legal certainty. These are the points at which constitutional principle, statutory drafting, and institutional incentives meet, and they are the points at which the Portuguese framework has repeatedly failed to deliver a usable pathway.

Integrating these observations with economic reasoning clarifies that institutional operability is not merely a legal or ethical issue but also an economic design problem, where the structuring of incentives, transaction costs, and labour recognition critically determines whether the framework can function effectively in practice. Social reproduction theory and contested commodities

perspectives further highlight that surrogates' gestational labour is both undervalued and structurally constrained under altruistic-only regimes, reinforcing the need for regulatory designs that align ethical protection with operational and market feasibility.

Design lessons from inoperability: authorisation, parentage, consent and implementation

The Portuguese case shows that institutional operability turns less on the headline choice of 'altruistic' versus 'commercial' than on how a framework manages four linked functions across time: entry authorisation, parentage and civil registration, consent and withdrawal, and operational implementation. These are the points at which legal principle must translate into an administrable route that participants can use without predictable collapse into informal arrangements. From an economic perspective, each of these functions also represents a coordination problem with associated transaction costs; failure in any function increases uncertainty, reduces efficiency, and may displace reproductive labour to less regulated contexts.

A first lesson concerns the authorisation route. A system that relies on pre-conception approval concentrates decision-making power in an institutional node, which can provide safeguards and consistency when the criteria are clear, the timelines are short, and review mechanisms are defined. The same architecture becomes fragile when criteria remain open-textured, when procedural steps multiply, or when institutional risk aversion becomes the de facto standard. A workable authorisation model, therefore, requires more than the designation of a competent authority. It requires a defined decision object, publicly intelligible criteria, a decision timetable that fits clinical reality, and a clear route for challenge that does not convert time-sensitive reproductive decisions into prolonged administrative stasis. Such a design mitigates high transaction costs and reduces the bargaining uncertainty that intended parents and surrogates face, promoting Pareto-improving outcomes within the formal framework.

A second lesson concerns parentage and registration. Operability depends on a mechanism capable of securing legal parentage within a predictable timeframe after birth, with a child's legal position insulated from extended uncertainty. Where the legal route leaves parentage contingent for an extended period, every other design element becomes harder to stabilise, including healthcare decision-making, financial responsibility, and the allocation of custody in a dispute. In frameworks that preserve strong protection of the surrogate's decisional authority up to a late stage, the parentage mechanism needs accompanying rules that address interim responsibility and expedited resolution. Without that architecture, the system may satisfy ethical caution while failing to deliver the legal closure a regulatory pathway requires (Raposo Vera, 2020; Trimmings and Beaumont, 2011). From an economic-institutional standpoint, delayed parentage recognition increases risk premia for participants and raises transaction costs, as resources, time, and decision-making are tied up in uncertainty rather than productive coordination.

A third lesson concerns consent and withdrawal as a time-structured legal problem. Protecting the surrogate's autonomy requires more than declaring a right to withdraw. The law must specify what withdrawal changes, at which stages, and through which procedures. It must also specify the consequences for medical decision-making, financial responsibility, and the legal position of the child where disagreement arises. When these issues are left under-specified, autonomy protection migrates into uncertainty, and uncertainty becomes a standing feature of the system. That form of uncertainty does not stay neutral. It shapes

participation incentives and encourages avoidance behaviour, including cross-border displacement and reliance on private ordering outside the domestic framework. This can be interpreted through feminist and reproductive labour economics (Rudrappa, 2021)—uncertainty over rights and obligations affects the willingness of surrogates to participate, as well as the allocation of their time and effort, creating inefficiencies and potentially unfair distributions of risk and reward.

A fourth lesson concerns implementation as part of the legal design, rather than a downstream technicality. A regime built around administrative prior approval cannot operate without secondary regulation defining procedure, documentation, clinical interfaces, and institutional responsibilities. Where implementing regulation does not arrive, the formal framework remains legally described and practically unusable. Portugal illustrates how this gap converts legislative permission into a form of legal signalling, leaving intended parents, potential surrogates, and clinicians without a lawful route that can be initiated and completed. Viewed through the lens of social reproduction theory and contested commodities perspectives, implementation failure renders the surrogate's labour invisible and undervalued, while also increasing reliance on informal or transnational arrangements where regulation and oversight are weaker.

These design lessons also illuminate the practical constraints shaping altruistic-only regimes. Enforceability, incentives, and transaction costs operate as structural limits on regulatory architecture, independent of any broader welfare-economic assessment. In expenses-only models, ambiguity surrounding permissible transfers tends to displace compensation into expansive reimbursement categories, reducing transparency and weakening effective protection.

A further operability issue arises because expenses-only drafting frequently fails to match the financial reality of pregnancy. Where the legal category is framed narrowly ('expenses') yet the lived burdens include lost income, childcare, travel, and longer-term health impacts, the system tends to generate either informal supplementation or expansive, weakly auditable reimbursement practices. This reduces legal visibility at the point where oversight is meant to be strongest, while leaving the surrogate's position exposed to uncertainty about what is permitted, what is enforceable, and what protections follow from payment characterisation. From an economic perspective, these hidden flows reflect unpriced costs and externalities within the reproductive labour market, reducing allocative efficiency and increasing the risk of inequitable outcomes.

From a design perspective, operability improves where expense categories are explicit, documentation duties are defined, and insurance and healthcare coverage are treated as core elements of the authorisation package rather than discretionary extras (Braveman et al., 2012; Crawshaw et al., 2012).

That dynamic affects institutional operability because it influences participation, risk allocation, and the credibility of oversight. As institutional-economics scholarship has long observed, governance structures become fragile when transaction costs and uncertainty overwhelm the coordinating capacity of formal rules (North, 1990; Williamson OE, 1985). A workable altruistic model therefore needs clear and auditable expense categories, rules on income replacement where permitted, and transparent treatment of intermediaries and professional fees, coupled with healthcare coverage and insurance arrangements that allocate pregnancy-related risks explicitly (Braveman et al., 2012).

Taken together, the Portuguese experience supports a narrow claim with wider relevance. Altruistic-only frameworks can become institutionally non-viable where extensive autonomy protection, centralised prior approval, and incomplete

implementation combine in a way that prevents a stable route from pre-conception authorisation to post-birth legal closure. The practical consequence is legal availability without a usable pathway, with displacement risks that are visible in the comparative literature on cross-border surrogacy (Deharo and Madanamoothoo, 2020; Trimmings and Beaumont, 2011). Integrating these lessons with economic reasoning reinforces the argument that effective surrogacy regulation must align ethical safeguards with transaction-cost-aware design, recognition of reproductive labour, and institutional pathways that reduce inefficiencies and market displacement.

Conclusion

Surrogacy regulation often turns on ethical disagreement, yet the Portuguese case indicates that ethical motivation does not itself generate an operational legal framework. Portugal adopted a formally permissive, altruistic-only model, coupled with extensive protection of the surrogate's decision-making authority and centralised prior approval. Constitutional review, legislative revision, and the absence of implementing regulation then interacted to produce a regime that remains legally articulated and practically unusable. That outcome illustrates how formal permission can fail to generate a usable institutional pathway in practice. From an institutional-economic perspective, this decoupling also produces elevated coordination costs and distorts participation incentives across the reproductive field.

Institutional operability is not advanced here as a measure of ethical validity. A regulatory choice may remain ethically preferable even where it proves fragile or difficult to implement. The claim developed in this article is narrower: that institutional fragility has distributive and ethical consequences that must be accounted for as part of responsible regulatory design. Economic reasoning helps clarify how poorly specified legal pathways increase uncertainty, reduce transparency, and shift risk onto the least protected actors.

The regulatory lesson drawn here is limited and structural. Where a jurisdiction chooses to permit surrogacy, operability requires an authorisation route that can be applied consistently within realistic timelines, a parentage mechanism capable of delivering rapid legal closure after birth, a time-structured consent and withdrawal architecture with defined consequences, and an implementation layer that translates statutory permission into administrable procedure. When these elements fail cumulatively, the system becomes fragile, participation incentives distort, and displacement pressures increase.

This analysis also clarifies why compensation questions continue to matter even in altruistic-only regimes. Excluding compensation does not remove financial flows from the system. It can shift them into ambiguous reimbursement practices, with implications for oversight and protection. Similar cross-border tensions have been documented in the European context, particularly in the European Court of Human Rights' decisions in *Menesson v. France* (European Court of Human Rights, 2014) and *Advisory Opinion P16-2018-001* (European Court of Human Rights, 2019), which underline the vulnerability of children born through foreign surrogacy arrangements to delayed or inconsistent recognition. Recognising surrogacy as reproductive labour helps explain why compensation, even when formally excluded, continues to shape incentives and institutional outcomes.

This analysis does not defend commercial surrogacy as a preferred normative model; it identifies compensation as one variable that alters institutional incentives and enforceability within regulatory design. Compensation does not resolve the ethical problems associated with surrogacy, but it does modify the design

space for enforceability, incentives, and risk allocation, and therefore warrants explicit legal treatment in any framework aimed at operability.

Portugal's experience provides a cautionary example of how restrictive permission can collapse into non-use. While grounded in the Portuguese experience, the design constraints identified here have relevance for jurisdictions considering or maintaining altruistic-only surrogacy frameworks. For those, the central question is institutional: whether the legal architecture can sustain a lawful pathway from initiation to legal closure, under the constraints the jurisdiction regards as ethically and constitutionally necessary.

Integrating legal, ethical, and economic reasoning allows that question to be addressed with greater clarity, revealing how institutional design choices shape not only normative legitimacy but also the practical functioning of surrogacy regulation.

Data availability

No datasets were generated or analysed during the current study.

Received: 18 April 2025; Accepted: 23 February 2026;

Published online: 10 March 2026

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Author contributions

All authors conceived the study and contributed to the final version of the manuscript.

Funding

This work is funded by national funds through FCT – Fundação para a Ciência e a Tecnologia, I.P., under the Programme Contract UID/04112/2025. <https://doi.org/10.54499/UID/04112/2025>. This work is funded by national funds through FCT – Fundação para a Ciência e a Tecnologia, I.P., under the Programme Contract UID/05105/2025. <https://doi.org/10.54499/UID/05105/2025>.

Competing interests

The authors declare no competing interests.

Ethical approval

Not applicable. As this study is a review/theoretical analysis of previously published literature and does not involve any primary data collection, human participants, or animal experiments, ethical approval and informed consent were not required.

Informed consent

Not applicable.

Additional information

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