



'URF AS AN EPISTEMOLOGICAL FRAMEWORK FOR VALIDATING LIVING LAW: A CRITICAL READING OF ARTICLE 2 OF INDONESIA'S 2023 CRIMINAL CODE

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Abstract

Article 2 of Law No. 1 of 2023 on the Criminal Code recognizes "living law" as a basis for criminal punishment but does not provide adequate criteria to distinguish customary norms that deserve penal force from those that risk reproducing injustice. The core problem is epistemic incompleteness in validating customary norms, which risks institutionalizing injustice, as reflected in discriminatory local policies and gender-asymmetric customary sanctions. This normative legal study employs a comparative-epistemological approach, operationalizing the doctrine of 'urf in uṣūl al-fiqh as its analytical framework. Three main findings emerge. First, the epistemology of 'urf offers a structured mechanism for validating norms through the 'urf ṣaḥīḥ–'urf fāsid distinction and its corrective function. Second, reading Article 2 through this lens reveals three structural alignments and five epistemological tensions, with the absence of a corrective function as the most fundamental weakness. Third, four verification standards social, substantive, temporal, and authoritative are formulated as an operational framework for the derivative regulations mandated by Article 2(3). The article thus positions Islamic law as an epistemological partner that transcends the formalization marginalization dichotomy and frames decolonization of criminal law as an epistemological transformation of the sources, limits, and legitimacy of punishment.

Keywords: 'urf epistemology; living law; criminal code; legal pluralism; corrective function

A. Introduction

The entry into force of Law No. 1 of 2023 on the Criminal Code (KUHP) on January 2, 2026, marks a significant turning point in the history of Indonesian criminal law. Beyond ending the colonial Wetboek van Strafrecht, the new Criminal Code seeks to redefine legal legitimacy in a pluralistic state (Butt & Lindsey, 2012). One of the most significant changes lies in the explicit recognition of "living law" through Article 2, which opens the possibility of criminal prosecution based on norms not codified in statutes. In the context of Indonesia, which adheres to a strong legal pluralism encompassing customary law, Islamic law, and state law operating

simultaneously, this provision can be understood as a rearticulation of the relationship between the state, society, and the law itself (Feener & Cammack (eds.), 2007; Lukito, 2013). However, it is precisely at this point that a more fundamental issue arises: when social norms are granted the authority to punish, the question of how those norms are validated becomes unavoidable.

This shows that Article 2's core problem is not the classic formal-material legality tension but the lack of clear epistemological mechanisms for validating living law (Remmelink, 2003). This provision acknowledges the existence of living norms, but fails to provide adequate tools to distinguish between customary norms that are worthy of being elevated to the basis of criminal punishment and norms that, although living and widespread, are substantively problematic. This is not merely a technical issue of legislation: In 2018, the National Commission on Violence Against Women documented 421 local regulations justified by reference to "values alive in society" only to find that they contained discriminatory elements against women and minority groups (Buehler, 2016; Lindsey & Pausacker (eds.), 2016). Without rigid limiting criteria, recognition of living law risks reproducing injustice that undermines human rights protection and the values of Pancasila (Febrianty et al., 2023) a risk that, as the comparative experiences of plural legal systems show, cannot be resolved merely through changes to the text of laws (Glenn, 2014).

A number of studies have attempted to interpret Article 2 of the Criminal Code from various perspectives; each of these studies nonetheless leaves significant gaps. Criminal law studies generally situate "living law" within the framework of an expansion of the principle of material legality, addressing the tension between the principle of *nullum crimen sine lege* and the recognition of unwritten norms, without delving into the deeper epistemological question of how the validity of customary norms themselves is determined (Edwing Gregorio et al., 2024; Hardianto et al., 2024; Junaidi & Susanto, 2025). More comparative studies, such as Butt (2023) in the Griffith Law Review, interpret the new Criminal Code as an effort to indigenize Indonesian criminal law, but the analysis stops at the level of the political legitimacy of recognizing living law, rather than its epistemological architecture. Legal-pluralism studies recognize non-state norms but seldom explain which norms deserve penal force, precisely the core issue of Article 2.

Meanwhile, studies of Islamic law in Indonesia tend to approach sharia and state law through legal policy and *maṣlaḥah*, emphasizing the accommodation of Muslim aspirations within national criminal codification (Ariyanti & Supani, 2024; Mudzhar, 1993), without delving into the epistemological framework for validating norms that is required. As for studies on the doctrine of *'urf in uṣūl al-fiqh*,

they have expanded beyond the domains of Islamic family and financial law, such as studies addressing contemporary fatwa reform (Auda, 2016; Kamali, 2003), environmental ethics (Jenkins, 2005), and the construction of customary law in Muslim societies (Najib, 2020), yet none have systematically applied it as an epistemological framework to test the construction of living law within national criminal law. This identified gap is not merely the absence of comparative studies between the two legal systems, but rather the absence of a more fundamental epistemological question: by what criteria do customary norms deserve punitive force, and which tradition has developed the most systematic answer to that question?

Given this gap, this article poses one central research question: How can the doctrine of *'urf* in *uṣūl al-fiqh* serve as an epistemological framework for interpreting, evaluating, and reconstructing the mechanism for validating customary norms under Article 2 of Indonesia's 2023 Criminal Code? To answer this question, the study pursues three objectives: to analyze the epistemological structure of the *'urf* doctrine; to examine the normative construction of Article 2 through this lens; and to formulate a reconstruction model for the validation of customary norms as the basis for criminal punishment. Theoretically, this article contributes to legal epistemology by bringing together the traditions of *uṣūl al-fiqh* and national law not within a normative comparative framework, but an epistemological one specifically by comparing how these two traditions construct criteria for the validity of norms, as formulated in the cross-legal tradition approach developed by Glenn, (2014).

Practically, this research offers a conceptual foundation for the implementing regulations mandated by Article 2(3), which remain open to interpretation. Within this framework, the position of Islamic law must be carefully located. An-Na'im (2008) argues that sharia functions most effectively as a source of public moral orientation when not formalized through state legislation, a claim relevant to political legitimacy but silent on epistemology. This article moves beyond that silence by showing how the epistemology of *'urf* can supply validation criteria that strengthen the internal coherence of the national criminal law system. Here, Islamic law is positioned not as a competing normative order but as an epistemological partner that contributes a methodology of norm validation, a framework still absent from current constructions of living law.

B. Method

This study is a normative legal study examining Article 2 of Law No. 1 of 2023 on the Criminal Code through the doctrine of *‘urf* in *uṣūl al-fiqh* as its epistemological framework. Its focus lies not on empirical legal behavior but on the conceptual structure and internal logic of the norm specifically, the validation mechanism for “living law” implied by Article 2 and the mechanism for validating customary norms developed within *uṣūl al-fiqh* (Marzuki, 2010; Ibrahim, 2006). This normative approach is chosen because the main problem is conceptual incompleteness, not lack of data, so analysis must uncover the underlying structures of legal texts rather than merely describe practice.

This study employs two complementary approaches. First, a conceptual approach systematically analyses the doctrine of *‘urf* its definition, typology, validity conditions, and corrective functions in classical and contemporary *uṣūl al-fiqh*, by tracing concepts to authoritative sources and identifying cross-school principles that can be operationalized analytically (Glenn, 2014). Second, an epistemological comparative approach juxtaposes the validation of custom implied in Article 2’s construction of living law with that developed in the *‘urf* doctrine, asking how each tradition constructs criteria for the validity of customary norms (Van Hoecke, 2015). With this distinction, *‘urf* is treated not as a normative alternative to positive law but as an analytical instrument for identifying gaps and guiding conceptual reconstruction.

Within this framework, *‘urf* performs three linked analytical functions: interpreting the epistemic structure of Article 2, testing the adequacy of its validity criteria, and guiding conceptual reconstruction. The study draws on three groups of sources: primary legal materials (Law No. 1 of 2023, its academic drafts and explanations, and key *uṣūl al-fiqh* texts on *‘urf* such as al-Ghazālī, al-Shāṭibī, al-Qarāfī, and Ibn ‘Āshūr); secondary literature in criminal law, legal theory, legal pluralism, and contemporary *uṣūl al-fiqh*; and selected policy documents and local regulations that provide empirical context. Analysis proceeds in two stages: a systematic interpretation of Article 2 within the architecture of the Criminal Code, especially its relationship to Articles 1 and 3 (Siroj et al., 2023). followed by a teleological interpretation of the *‘urf* doctrine through *maqāṣid al-sharī‘ah* to identify cross-contextual principles for validating customary norms (Auda, 2016; Ibn ‘Āshūr, 2006), which are then synthesized through epistemological comparison (Auda, 2016; Ibn ‘Āshūr, 2006).

C. Results And Discussion

1. The Epistemology Of 'Urf In Uṣūl Al-Fiqh: From Custom To The Validity Of Norms

Before the doctrine of 'urf can be applied to Article 2, it must be understood not as a descriptive concept of custom but as an epistemological tool that answers a fundamental question: when is a custom worthy of recognition as a legal norm? In *uṣūl al-fiqh*, 'urf is not a passive acknowledgement of social reality but a selective mechanism that evaluates, filters, and transforms social practices into binding norms, establishing criteria by which context is tested normatively. This shift from describing which customs exist to assessing which deserve validity is what distinguishes the epistemology of 'urf from a mere theory of social acceptance and makes it directly relevant to Article 2.

Etymologically, 'urf derives from *'araḥa* that which is known and collectively acknowledged but terminologically, jurists emphasize rationality and selective acceptance. Al-Suyūṭī defines 'urf as what becomes established in the human mind through rational consideration and is accepted by sound nature (Al-Suyūṭī, 1983), positioning it from the outset not as mere social fact but as the result of interaction between rationality and custom. A practice does not become law simply by existing; it must meet standards that render it worthy of recognition. Kamali, (2003) reinforces this with "recurring practices acceptable to people of sound nature" where "sound nature" signals that the acceptance is not arbitrary but filtered through collective reasoning. Even at the level of definition, then, 'urf possesses an epistemic function: it determines not what is in effect, but what is worthy of being in effect.

The position of 'urf within the hierarchy of Islamic legal sources reinforces this selective nature. It does not stand equal to the Qur'an and Sunnah but functions as a supporting argument (*dalīl tābī'*) in areas not explicitly regulated by the texts (Al-Zuhailī, 1985). Both Wahbah al-Zuhailī and Kamali (2003) ground its legitimacy in service to the public interest, provided it does not conflict with definitive provisions, though they differ in emphasis: al-Zuhailī stresses 'urf as interpreter and specifier of general norms, Kamali its capacity as an independent source where the text is silent. This difference reflects two distinct ways of understanding the relationship between text and context in the formation of law, a tension that, as will be shown, is also present in the construction of Article 2 of the Criminal Code. Thus,

the validity of *urf* is always conditional; that is, it is recognized not merely because of its existence, but because of its conformity with a higher normative structure.

This contrasts sharply with the sociological notion of living law. For Eugen Ehrlich, true law lies in the norms actually followed in communal life (*Innenrecht*), so social effectiveness becomes the primary criterion of legality (Ehrlich, 1936). By contrast, in the epistemology of *urf* social effectiveness is only a preliminary condition (*syarʿ al-wujūd*): even a widespread custom must still be tested against justice and the public good before becoming binding. *Urf* does not ask whether a norm is alive but whether a living norm is worthy, shifting the focus from sociological description to epistemological validation a shift absent from Article 2's current construction of living law.

The epistemological structure of *urf* becomes increasingly apparent when viewed through the lens of how scholars classify it. Scholars distinguish between general *urf* (*urf āmm*), which applies across communities, and specific *urf* (*urf khāṣṣ*), which is limited to a particular community or region. However, what is most significant epistemologically is the distinction between *urf ṣaḥīḥ* (valid custom) and *urf fāsid* (invalid custom) (Al-Zuhailī, 1985; Kamali, 2003). This distinction lies at the heart of the entire validation mechanism, affirming that not all customs that are alive and dominant in society are entitled to normative status. A custom is categorized as *urf fāsid* if it contradicts the principle of justice, undermines the public interest, or violates more fundamental values within the normative system. Al-Shāṭibī goes even further by asserting that under such conditions, the law is not only entitled to reject such customs but is “obligated” to alter or abolish them (Al-Shāṭibī, 1997).

Al-Shāṭibī's statement has implications that extend beyond the doctrine of *urf* itself: it affirms that the law is not merely responsive to social reality, but possesses a normative mandate to shape and, if necessary, correct that reality. *Urf* thus has not only an affirmative function, that is, recognizing legitimate customs as law, but also a corrective function that ensures the law does not submit entirely to existing social practices.

This corrective function is operationalized through the conditions of validity systematically formulated in the literature of *uṣūl al-fiqh*. A custom can only be recognized as a valid *urf* if it meets four criteria: first, it must be genuinely dominant and widespread within the relevant community (*ghālib muntashir*), so that not every sporadic or marginal practice can be elevated to the status of a norm; second, it must have been consistently in place prior to the establishment of the law, so that its application is not retroactive; third, it must not contradict higher normative texts

or definitive principles (*qaṭʿī*); and fourth, it must be consistent with the principles of justice and the public interest (Al-Zuhailī, 1985; Auda, 2016; Kamali, 2003). These four conditions show that the validity of *ʿurf* is never automatic but the result of a layered selection process. The principle *al-ʿadah muḥakkamah* that custom may serve as a legal basis cannot be read as legitimizing all social practices; it operates only within the strict boundaries of these criteria. Read otherwise, it risks becoming an uncontrolled justification, much like the construction of “living law” under Article 2.

The operational mechanism of *ʿurf* shows how customs are integrated into the legal system through a deliberate process. *ʿUrf* often specifies or clarifies general norms, keeping the law relevant to changing contexts without losing its normative foundation. In *Al-Muwāfaqāt*, Al-Shāṭibī frames legal change with time, place, and circumstance as part of the logic of *maqāṣid al-sharīʿah*, not a concession to relativism but an adaptive mechanism under a clear epistemological framework (Al-Shāṭibī, 1997). Al-Qarāfī in *Al-Furūq* reinforces this: the evolution of fatwas alongside shifts in *ʿurf* is not inconsistency but fidelity to the law's deeper objectives, that it remain relevant to the concrete realities of people's lives (Al-Qarāfī, 2001). This adaptation is not an unlimited compromise, but a directed process, in which social change is accommodated to the extent that it remains within the orbit of the fundamental values of Sharia and does not violate the established criteria of validity.

At a more concrete level, this entire mechanism is codified in the principles of *fiqh*, which serve as a concise expression of the epistemology of *ʿurf*. The two most relevant principles for this analysis are: *al-maʿrūf ʿurfān ka al-mashrūṭ syarṭan*, that which is known by custom is equivalent to that which is explicitly stipulated, and *al-thābit bi al-ʿurf ka al-thābit bi al-naṣṣ*, that which is established by custom is equivalent to that which is established by text (Al-Suyūṭī, 1983). Both principles affirm that custom can carry normative force equivalent to explicit provisions, but only after the rigorous validation outlined above. The normative force of *ʿurf* is acquired, not inherited. This is what fundamentally distinguishes it from the concept of living law, which tends to treat the normative force of customary norms as already existing once the norm is proven alive in society.

Read in full, the epistemology of *ʿurf* reveals one fundamental principle: the law does not merely acknowledge social reality but actively assesses and shapes it an epistemological stance on the relationship between validity and effectiveness, norms and social facts. This is where its relevance to Article 2 lies: not as an alternative norm replacing positive law, but as a source of the right questions the

living law construct has not yet raised. When the state recognizes living law as the basis for criminal punishment, the very same questions that the doctrine of '*urf*' has answered for centuries resurface with renewed urgency: not whether the custom exists, but whether it is worthy of becoming law? and by what criteria is that worthiness determined.

2. Reading Article 2 Of The 2023 Criminal Code Through The Lens Of '*Urf*':

Epistemological Convergence And Tension

Read through the epistemological lens of '*urf*', Article 2 does more than introduce a new norm; it shifts the foundation of the law's binding force. By allowing punishment based on "the law that lives in society" even when uncoded, the state acknowledges that law is not identical to text and that social norms can possess legal authority. Once such norms are granted punitive force, however, the question of how they are validated becomes unavoidable yet it is precisely here that Article 2 reveals its most serious shortcoming: recognition is granted without corresponding validation mechanisms.

The normative structure of Article 2 of the Criminal Code reveals that this provision is built upon three intertwined layers that are not epistemologically complementary. The first clause contains the ontological premise that living law can serve as the basis for criminal punishment; the second clause establishes normative boundaries through references to Pancasila, the 1945 Constitution, and human rights; while the third clause implicitly acknowledges that its operational mechanisms are not yet available by deferring them to government regulations that have yet to be enacted (Hardinanto et al., 2024). In practice, this living law is envisioned through formalization into a Regional Regulation (Perda), which aims at legal certainty but raises challenges of value synchronization between customary and national law (Apaut, 2026). In criminal-law terms, the construction is often read as a progressive expansion of material legality (Junaidi & Susanto, 2025), not incorrect, but stopping at political legitimacy without testing whether the underlying epistemological structure is adequate. What emerges is an incomplete recognition: customary norms are granted punitive power, but the procedures for determining which norms deserve it remain entirely open what Butt (2023) calls the "inherent tension" between normative ambition and epistemological completeness in indigenizing Indonesian criminal law.

Interpreted through '*urf*', several structural convergences emerge, showing that the normative intuition of Article 2 is not foreign to the Islamic legal tradition.

Identifying these honestly matters, because it is precisely these similarities that make the incompleteness of Article 2 apparent. The first point of convergence lies in the principle of the locality of norms: the limitation of the applicability of living law to “the place where the law is alive” reflects the distinction in *‘urf* between the general (*‘urf ‘āmm*) and the specific (*‘urf khāṣṣ*), wherein, in both frameworks, the validity of a norm is not automatically universal but is tied to the social space in which it operates (Al-Zuhailī, 1985).

The second similarity lies in the principle of normative hierarchy: the placement of living law under constitutional values and human rights bears a strong structural resemblance to the principle in *uṣūl al-fiqh* that *‘urf* applies only as long as it does not conflict with higher normative sources. In the tradition of *uṣūl al-fiqh*, this normative hierarchy is explicitly structured: the Qur’an and Sunnah as primary sources of a “definite (*qaṭ’ī*)” nature, followed by *ijmā’* and the fundamental principles of *maqāṣid al-sharī’ah*, and only then *‘urf* as a supporting argument operating within the scope not covered by the sources above it (Al-Ghazālī, 1993, 1993; Al-Zuhailī, 1985; Kamali, 2003). Thus in both frameworks, customary norms never stand on their own: they remain subordinate to more fundamental principles, deriving normative force from alignment with that hierarchy, not from social prevalence alone. A third convergence is the assumption of prevalence: both presuppose a norm that is genuinely dominant and widely followed, not sporadic or marginal. Even the idea that unwritten norms can possess equal force to written norms finds its resonance in the principle that “what is established by custom is like what is established by text.” This structural alignment is not a historical coincidence; it reflects the reality that Indonesia, as a Muslim-majority society that is simultaneously legally pluralistic, has long lived within a tradition that recognizes non-state norms as a source of binding obligations (Lukito, 2013).

Yet precisely because this correspondence is so strong, the tensions beneath it become serious. The first and most fundamental is the absence of a mechanism for distinguishing valid from invalid customary norms. In the epistemology of *‘urf*, the distinction between *‘urf ṣaḥīḥ* and *‘urf fāsid* is not merely an academic categorization: it is the core of the entire validation mechanism that determines whether a custom is worthy of normative force or must be rejected or even abolished (Al-Shāṭibī, 1997). Article 2 of the Criminal Code lacks a mechanism equivalent to this distinction. It acknowledges the existence of living norms but does not provide substantive criteria to distinguish between customs that are worthy of serving as the basis for criminal punishment and customs that, although widespread

and consistently followed, actually contradict the principle of justice. Without a filter testing whether a customary norm truly harmonizes with substantive justice, Article 2 risks legalizing practices that infringe individual rights in the name of tradition (Arifin et al., 2025). The consequences of the absence of such a filter or criteria are not merely theoretical. Komnas Perempuan's monitoring (2009–2016) identified 421 discriminatory local policies, 80% targeting women, yet only 38 (≈9%) were revoked or revised, showing that without validity filters, problematic 'living' norms tend to persist even after being flagged as unjust (National Commission on Violence Against Women, 2018; Buehler, 2016).

Similar patterns appear elsewhere. The Supreme Court, in a line of rulings from Decision No. 179 K/SIP/1961 to No. 573 K/Pdt/2017, has repeatedly refused to uphold patrilineal inheritance norms in Batak Toba, Karo, Rote Ndao, and parts of Balinese custom that exclude daughters, even though these norms meet every sociological criterion of "living law," and this stance is codified in Jurisprudence No. 3/Yur/Pdt/2018 (Ritonga et al., 2024; Ulfah & Syafitri, 2024). Courts thus exercise a corrective function akin to the doctrine of *'urf fāsid*, but without clear standards or institutionalized procedures. A parallel pattern emerges in customary land disputes in Papua, Central Kalimantan, and Riau, where conflicting "living" norms lack epistemological arbitration (Santoso et al., 2023; Utama, 2020; Al-Zuhaili, 1985), and in empirical studies of the Batak Toba diaspora, where patrilineal norms have shifted in practice but continue to be judicially applied, a temporal asymmetry anticipated by Al-Qarāfi's warning against applying outdated *'urf* (Harahap et al., 2025; Siregar et al., 2025)

These three patterns customary inheritance norms that deny women's rights despite being widespread, conflicting claims to communal land without epistemological arbitration, and norms that have lost their social basis yet are still enforced point to a single conclusion: norms that exist within a society are not inherently just simply because they exist and are widely accepted. Within the framework of *'urf*, such norms would be immediately categorized as *'urf fāsid* not only unworthy of recognition but also requiring amendment. In the construction of Article 2 of the Criminal Code, no equivalent mechanism exists to perform such screening, let alone ensure that norms identified as problematic can be systematically abolished.

The second tension relates to the ambiguity of epistemic authority that is, who has the authority to determine that a norm is truly alive, dominant, and worthy of recognition as a law capable of imposing criminal penalties. In the doctrine of *'urf*, this authority is not delegated arbitrarily: it rests with figures possessing dual

epistemic capacities that is, figures capable of assessing both the social aspects of a custom and its normative aspects within the framework of Sharia (Al-Zuhailī, 1986; Kamali, 2003). In the tradition of *uṣūl al-fiqh*, the judge is not merely a discoverer of social facts, but a normative evaluator who works with systematically formulated criteria. Article 2 of the Criminal Code, conversely, delegates this operationalization to government regulations that have yet to provide clarity, leaving judges facing concrete cases without clear standards to determine whether a norm qualifies as a “living law” that can serve as the basis for criminal punishment. The absence of these standards creates legal uncertainty for the defendant and opens the door to inconsistent rulings that undermine equality before the law. (Hardinanto et al., 2024)

The third tension concerns the mechanism for mediating between local-particular customary norms and universal principles, particularly human rights. Article 2 of the Criminal Code explicitly requires that living law be consistent with human rights, but does not provide procedures for resolving conflicts when local norms clash with these universal standards. In *‘urf*, such tensions are managed through the *qaṭ’ī-ẓannī* structure: *‘urf* can specify the general or clarify the ambiguous but cannot nullify the certain (Al-Ghazālī, Al-Mustaṣfā; Al-Shāṭibī, 1997). Article 2 lacks an equivalent mediation structure; its reference to human rights in paragraph (2) is declaratory, not procedural, offering no operational guidance for resolving conflicts between cultural particularity and universal norms.

The fourth tension relates to the temporal dimension of living law, which is not adequately addressed in the construction of Article 2. A customary norm alive in one period may lose its relevance in another through demographic or value change. In *‘urf*, Al-Shāṭibī and Al-Qarāfī accommodate this: law based on *‘urf* changes as the *‘urf* changes, and a judge applying old law to a changed context violates rather than upholds *maqāṣid al-sharī’ah*, a built-in mechanism of continuous evaluation against stagnation (Al-Qarāfī, 1994; Al-Shāṭibī, 1997). Article 2 lacks such a temporal evaluation mechanism: once a norm is recognized through a government regulation, no clear procedure exists to assess whether it still meets the criterion of social prevalence over time.

At this point, the most serious tension in the entire analysis can be precisely articulated: Article 2 of the Criminal Code serves only an affirmative function with respect to customary norms, but lacks a corrective function. It may recognize living law as the basis for criminal punishment, but it does not provide a mechanism to reject, revise, or abolish customary norms that are proven to be problematic. In the

epistemology of *'urf*, these two functions affirmative and corrective cannot be separated; that is, recognizing custom as law without the capacity to correct it constitutes a betrayal of the very purpose of law itself, for good law is not merely law that reflects its society, but law that is capable of shaping its society toward a more just direction (Al-Shāṭibī, 1997; Ibn 'Āshūr, 2006). It is the absence of this corrective function that most distinguishes the construction of “living law” in Article 2 of the Criminal Code from the epistemology of *'urf*, and which most risks shifting the law from its normative position into merely a reflection of existing social practices, rather than serving as an instrument to evaluate and shape them.

From this overall analysis, it can be concluded that the main issue with Article 2 of the Criminal Code does not lie in its boldness in acknowledging living law, as that boldness deserves to be appreciated as a significant step toward decolonization (Butt, 2023). The problem lies in the epistemological incompleteness in managing the consequences of that recognition: there is no validity filter, no clear epistemological authority, no mechanism for mediating universal-particular norms, no temporal evaluation, and no corrective function. This is where *'urf* demonstrates its most substantive relevance: not as a normative alternative to positive law, but as an epistemological framework providing what Article 2 has not the criteria, procedures, hierarchy, and corrective mechanisms for validating customary norms as a basis for criminal punishment.

3. Reconstructive Implications: The Epistemology Of *'Urf* As A Way Out Of The Crisis Of Normative Validation

The interpretation of Article 2 through the lens of *'urf* yields a precise diagnosis: the problem is not the absence of recognition of social norms but the incompleteness of the framework for validating them, evident in five gaps, no substantive validity filter, no clear epistemic authority, no mediation between local and universal norms, no temporal evaluation, and no corrective function. What this calls for is not new norms in the legal text but a rethinking of how customary norms acquire legal force, and here the epistemology of *'urf* offers a model that can be concretely operationalized.

This reconstruction can be formulated through four verification standards that have been systematically developed within the tradition of *uṣūl al-fiqh*, but have not yet been articulated in the construction of Article 2 of the Criminal Code. These four standards do not operate sequentially or hierarchically, but rather simultaneously as an integrated validation system, mirroring the logic of *'urf ṣaḥīḥ*,

whose conditions in the tradition of uṣūl al-fiqh cannot be met partially. Table 1 summarizes the four standards, their epistemological parallels within the 'urf tradition, and the gaps in Article 2 each addresses:

Table 1. The Four Verification Standards: Epistemological Parallels and Corrective Functions

Verification Standard	Core Question	'Urf Parallel	Gap Addressed in Article 2
Social	Is the norm genuinely dominant and widespread within the relevant community?	<i>Ghālib muntashir</i> , the requirement of genuine social prevalence	Absence of an empirical prevalence filter
Substantive	Does the norm conform to principles of justice and public welfare?	'Urf ṣaḥīḥ vs. 'urf fāsid, the validity-invalidity distinction	Absence of a substantive validity filter
Temporal	Has the norm been consistently observed prior to the legal event, and does it remain socially relevant?	Al-Qarāfī's principle that applying outdated 'urf violates, not fulfills, the law's purpose	Absence of ongoing temporal evaluation
Authoritative	Who determines the norm's validity, and through what inclusive process?	The judge's dual epistemic capacity, assessing both social and normative dimensions	Absence of a clear, inclusive determination procedure

Source: Developed by the authors based on Al-Zuhailī (1985), Kamali (2003), Al-Qarāfī (1994), and Al-Shāṭibī (1997)

The first standard is social verification: customary norms must be empirically verifiable as practices that are truly dominant and widespread (*ghālib muntashir*) within a particular community, rather than merely claimed as such by interested parties. In the context of regulations derived from Article 2 of the Criminal Code as mandated by paragraph (3), this means that government

regulations must establish concrete empirical verification mechanisms: who conducts the verification, by what methods, and through what process. Comparative experiences from Morocco and Malaysia, two countries that have integrated customary norms into their positive legal systems, demonstrate that effective social verification requires the involvement of a multidisciplinary team comprising legal anthropologists, sociologists, and local community representatives, rather than unilateral determination by legal authorities (Hooker, 1978; Cammack & Feener, 2012). Without institutionalized verification, living law risks becoming an instrument anyone can claim for any purpose a risk *'urf* anticipates by requiring that a custom be genuinely alive, not constructed by the ruling authority.

The second standard is substantive testing: a customary norm cannot serve as the basis for criminal punishment merely because it is alive and dominant, but must first be tested to determine whether it falls under *'urf ṣaḥīḥ* worthy of recognition or *'urf fāsid* which must be rejected or even abolished. This is the most crucial yet most absent standard in the construction of Article 2 of the Criminal Code. In its application, this substantive test must operate through two layers of criteria: first, conformity with fixed constitutional principles Pancasila, the 1945 Constitution, and human rights instruments ratified by Indonesia; and second, conformity with the substantive principle of public welfare that is, whether the norm genuinely protects or, conversely, harms the most vulnerable groups within the community. This filter ensures that living law does not legitimize injustice but is oriented toward broad public welfare (Ariyanti & Supani, 2024), closing the loophole for discriminatory customary norms through rigorous scrutiny of fundamental values of justice (Febrianty et al., 2023). These two layers reflect the *qaṭ'ī-ẓannī* structure: definitive norms cannot be compromised by any custom, interpretive leeway applying only to open-ended ones. This is the long-missing mechanism to reject discriminatory norms even when widespread the function of *'urf fāsid*, which not only rejects but mandates abolishing customs that undermine the public interest (Al-Shātibī, 1997).

The third standard is temporal continuity: a customary norm must be shown to have been consistently observed over a sufficient period of time prior to the occurrence of the legal event, so that its application is not retroactive and does not leave room for post hoc construction of a norm claimed to be customary. This temporal dimension ensures that recognized *'urf* reflects stable practice, not a fleeting response to a specific event (Al-Qarāfī, 1994). More important is Al-Qarāfī's further implication: a once-valid *'urf* can lose validity as society changes, so applying it to a changed context violates rather than fulfills the law's purpose. This demands

what Article 2 entirely lacks: a sunset clause or periodic evaluation of recognized norms, ensuring that recognition does not perpetuate norms that have lost their social basis.

The fourth standard is an inclusive, authoritative determination: the validity of customary norms cannot be unilaterally established by legal authorities or administrative officials alone, but must be determined through a process that simultaneously involves various epistemic capacities. This is particularly urgent given that mechanisms for applying living law within the national legal system are often trapped in mere administrative formalism through local regulations (Perda), without an inclusive empirical validation process (Apaut, 2026). In *urf*, the judge is a normative evaluator assessing both the social and normative dimensions of a custom (Al-Zuhaili, 1986; Kamali, 2003). In a secular-pluralist system this dual capacity cannot rest on a single figure but must be distributed through inclusive mechanisms. Concretely, regulations under Article 2 must establish procedures involving three components: representation of affected local communities, including historically marginalized groups; the expertise of legal anthropologists and sociologists to verify claims of prevalence; and normative review by a body assessing compliance with constitutional principles and human rights. A similar mechanism, albeit in a different context, has been developed in South Africa's post-apartheid legal system, where recognition of customary law is accompanied by a "living customary law" mechanism that distinguishes between customary norms that are genuinely alive in community practice and those merely claimed to be alive by customary elites (Tamanaha, 2008; Glenn, 2014).

Read together, these four standards address the first four gaps, each as mapped in Table 1. The fifth gap, the absence of a corrective function, is addressed by the system as a whole; that is, when the four standards operate simultaneously, a corrective function need not be established as an additional mechanism because it is already embedded within the logic of validation itself. Norms that do not meet substantive standards are not only rejected but, following *Al-Shāṭibī's* logic, should be amended; and norms that no longer meet temporal and social standards are not only capable of being repealed but must be repealed to ensure consistency with the purpose of the law.

The practical force of this framework becomes clear when applied to a documented case. The prostitution regulation issued by the City of Tangerang one of the 421 discriminatory local policies identified by Komnas Perempuan (2018) was explicitly justified as reflecting norms "alive in the local community." Applied to

this case, the social standard would demand empirical proof of community-wide prevalence rather than mere assertions by drafters; the substantive standard would classify the regulation as *'urf fāsid* because it harms vulnerable women and violates equal protection; the temporal standard would test whether the norm pre-dated codification or was an ad hoc construction; and the authoritative standard would require an inclusive determination process rather than unilateral official action. Under such scrutiny, the regulation would likely have failed and the woman arrested while waiting for transport would not have been punished in the name of living law.

The implications of this reconstruction reach beyond Article 2 to the epistemological position of Islamic law within the national legal system. The debate over Islamic and state law in Indonesia has long been trapped between two poles: formalizing Sharia as positive law, or marginalizing Islamic law as a private-religious matter (Mudzhar, 2012; Itmam, 2013). Therefore, this article argues that reconstruction through the epistemology of *'urf* opens up a third position that transcends these two poles, namely Islamic law as an epistemological partner a tradition that contributes not through the content of its norms, but through its way of thinking in validating norms. In this position, *'urf's* contribution to the construction of living law is not the Islamization of criminal law, but rather an epistemological enrichment of the existing legal system.

This position must be distinguished from An-Na'im's (2008) argument, relevant at the level of political legitimacy but silent on epistemology. An-Na'im holds that sharia functions effectively as a moral orientation in the public sphere when not formalized through state legislation. This article's reconstruction does not contradict that premise but transcends it: the epistemology of *'urf* contributes not only as informal moral orientation but as a methodological framework guiding how the state validates the customary norms it recognizes. This is not a formalization of Sharia, but rather the adoption of an epistemological methodology that has proven capable of addressing the very same questions now faced by Article 2 of the Criminal Code. In other words, what is adopted is not what *'urf* prescribes, but how *'urf* determines whether a custom is worthy of becoming law.

This finds support in states that maintain modern legal systems while drawing on Islamic legal tradition: Egypt integrates *maqāṣid al-sharī'ah* into constitutional interpretation without making it directly applicable positive law (Lombardi, 2006), and Malaysia operates fatwa mechanisms parallel to its civil system (Cammack & Feener, 2012). Such experiences confirm that epistemological integration, distinct from normative integration, is the most realistic path for the Islamic legal tradition's contribution to modern legal systems (Glenn, 2014). On a

broader level, this reconstruction also touches on the project of decolonizing Indonesian criminal law, which goes beyond a mere replacement of texts. Butt (2023) correctly identifies that the new Criminal Code represents an effort to indigenize criminal law; however, authentic indigenization cannot be achieved merely through normative recognition of living law without an adequate epistemological framework to validate it. Epistemic decolonization, as Tamanaha (2008) argues in global legal pluralism, requires that non-Western traditions be recognized not only in their existence but in their epistemological capacity their ability to provide ways of thinking about law that Western traditions cannot. The epistemology of *'urf*, with a validation structure refined over centuries to address the very questions Article 2 now faces, is among the strongest candidates for such a contribution.

The reconstructive implications thus operate on three levels: technical-regulatory (a foundation for more precise regulations under Article 2, with four operationalizable standards), theoretical-epistemological (a third position beyond formalization versus marginalization), and political-legal (a decolonization deeper than textual replacement, a renewal of how law derives legitimacy and by what criteria social norms deserve punitive force).

D. Conclusion

This study demonstrates that the primary issue with Article 2 of the 2023 Criminal Code lies not in its recognition of living law but in the epistemological incompleteness of validating customary norms as a basis for criminal punishment. Examining the doctrine of *'urf* yields three findings. First, *'urf* provides a structured validation mechanism typology, layered conditions, corrective function, temporal dimension shifting the question from whether a living norm exists to whether it deserves legal force. Second, *'urf* and Article 2 align structurally but diverge in five gaps, above all the absent corrective function that leaves living law vulnerable to reproducing injustice. Third, four verification standards social, substantive, temporal, and authoritative offer an operational framework to address these gaps while positioning Islamic law as an epistemological partner, not a competitor, within the state's legal system.

This research remains limited to normative-epistemological analysis. Future work could move in two directions: the four standards can inform the drafting of implementing regulations under Article 2(3), and comparative studies of how judges in Indonesia, Morocco, and Malaysia validate customary

norms in criminal cases would test the framework against actual practice. Ultimately, the decolonization of criminal law demands epistemological transformation, not merely normative revision an opportunity the regulations mandated by Article 2(3) make immediate, and to which the epistemology of 'urf offers a contribution locally urgent and globally significant for the debate on legal pluralism.

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