



Pruning the Culture Tree of Ghana: Why Should the Traditional System of Authority Use the Consultative Process? The Case of the Mamprusi Community

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*Since independence Ghana has made major progress in the attainment and consolidation of growth. Significant progress has been made in poverty reduction, improvement in economic development, good governance, youth and gender empowerment. Important pieces of relevant legislation have been enacted and institutional arrangements improved to promote inclusive society...However, a number of questions arise as to how to accelerate equitable growth and sustainable human development towards the attainment of a middle income country status and the attainment of MDGs by 2015.*¹

*Traditional cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women.*²

In this paper my objective is in two parts. The first is to map out the legal powers of the chief³ to “interpret” or “reinterpret” customary law and the second is to look at the benefits of using a consultative process by chiefs to “interpret” or “re-interpret” widowhood rites to conform to constitutional and international standards of development of the person. My argument is that women have been socially excluded⁴ due to the discriminatory cultural practice of widowhood rites and that the chief should be able to use his privileged position in the community setting through a consultative process to guarantee these rights. I will concentrate on widowhood rites among the Mamprusi community of the northern part of

¹ Statement by Daouda Toure, UN Resident Coordinator and UNDP Resident Representative in Ghana. See the preface to: United Nations Development Programme (UNDP), *The Ghana Human Development Report* (2007).

² Office of the High Commissioner for Human Rights, Fact Sheet No 23., *Harmful Traditional Practices Affecting the Health of Women and Children* (1995), available at: <http://www.unhchr.ch/html/menu6/2/fs23.htm#l> (Last visited May 13, 2008).

³ A chief is defined in article 277 of the 1992 constitution to mean “a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the prevalent customary law and usage.”

⁴ Social Exclusion has defined as “limited/inequitable opportunities and capabilities to participate in decision making, gain access to meaningful livelihood opportunities and social services due to discriminatory institutional practices in the political, economic, social spheres based on gender, ethnicity, geographical location, age, income status, health status, educational attainment and disability.” See *supra* note 1, at 17. This report goes on further to identify persons who are excluded to include victims of harmful traditional practices especially victims of harmful widowhood rites and perceived witchcraft.



Ghana.⁵ The Mamprusi community is made up of the East and West Mamprusi Districts of Ghana. This community being patriarchal in nature puts so much premium on “manness”. The death of a man is seen as a misfortune to the community and taken very seriously. The belief in life after death is very strong in this community and the spirit of the dead must be appeased and sent to the land of his/her ancestors. If this is not done then calamity⁶ will befall his/her immediate family and in some cases the community as a whole.

These rites while appeasing the soul of the departed also tests the fidelity of the widow to the husband when he was alive. Amongst other rituals, the widow’s hair is shaved off her head. She is also stripped and bathed naked during the funeral rites of her husband. She may eventually be compelled to marry one of her late husband’s siblings or face various reprisals such as being disowned by her family, denied certain communal rights or even lose her children to her husband’s family. For all intents and purposes, she is treated as part of the property of her late husband and “devolves” to some relative or other. If she is fortunate to have male children who inherit her late husband’s property then she might be able to benefit from her son’s inheritance. Female children on the other hand do not inherit any of their father’s property. They inherit only properties owned by their mothers. This brings a lot of hardship to a widow with only female children.

Ghana is a multi-cultural society with different cultural norms and practices. These cultural norms form the bulk of customary law of the different communities. By article 11 of the 1992 Constitution customary law⁷ forms part of the laws of Ghana. Customary law (both good and bad) in certain circumstances is regarded as one’s personal law.⁸ Article 1(2) of the 1992 constitution of Ghana provides

⁵ Two reasons why I chose this community: Firstly my familiarity with the community and secondly because of the short period within which this long paper was to be written. No intense field research could have been undertaken in another community considering the limited timeframe.

⁶ Such as sickness, famine, floods, bareness etc.

⁷ Also see § 18 of the Interpretation Act 1960 (C. A. 4) as amended by The Interpretation (Amendment) Act, 1961 (Act 92); The Interpretation (Amendment) (No.2) Act, 1962 (Act 145); Interpretation Act (Amendment) Law, 1982 (PNDCL 12); Local Administration Act, 1971 (Act 359); Local Government Act, 1993 (Act 462).

⁸ § 54 of the Courts Act, 1993 (Act 459) as amended by Courts (Amendment) Act, 1993 (Act 464), The Children’s Act 1998 (Act 560) Courts (Amendment) Act, 2002 (Act 620) and The Courts (Amendment) Act, 2004 (Act 674) reads as follows:

(1) Subject to this Act and any other enactment, a court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

Rule 1. An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction be taken to have intended to govern the issue.

Rule 2. In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person’s estate shall be the personal law of that person.

Rule 3. In the absence of any intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal law of that person or those persons.

Rule 4. In applying Rules 2 and 3 to disputes relating to titles to land, due regard shall be had to any overriding provisions of the law of the place in which the land is situated.



that the Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the constitution shall, to the extent of the inconsistency, be void. The question is to what extent can this provision be enforced considering the complex nature of our customary law system?⁹

From a close reading of the 1992 Constitution,¹⁰ customary law is grouped into judicial and non-judicial customary law. Judicial customary law constitutes the customs recognized and assimilated through judicial decisions by the courts into the legal system. Non-judicial customary laws on the other hand are those that have not received any judicial scrutiny yet are practiced by particular communities in Ghana. In this paper, I look at non-judicial customary law. Although this part of customary law has not been tried and tested in judicial courts there are specific Ghanaian laws that abolish or modify them one way or the other.

Rule 5. Subject to Rules 1 to 4, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law, the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms with natural justice, equity and good conscience.

Rule 6. In determining an issue to which the preceding Rules do not apply, the court shall apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties, having regard to equity and good conscience.

Rule 7. Subject to any directions that the Supreme Court may give in exercise of its powers under article 132 of the Constitution, in the determination of any issue arising from the common law or customary law, the court may adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious and to meet the requirements of justice, equity and good conscience.

(2) Subject to this Act and any other enactment, the rules of law and evidence (including the rules of private international law) that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur.

⁹ Judges have made this complex system of practices worse by interpreting customary law their own way. Some judges refuse to consult experts in particular customs when an issue comes before them. They rather rely on their own narrow interpretations or sometimes even impose their own cultures on the parties before them. This "judicial created customary law" also has a life of its own and is sometimes applied to parties appearing before the judge even though the said parties no nothing about the alleged custom pertaining in their community. In the case of *Fiaklu V. Adjiiiani* [1972] 2 GLR 209 there was a conflict between customary practice and decided cases. The Plaintiff argued that by ancient custom in respect to alienation of land, it was the *Korle* priest who had the authority to grant *kokomlemle* lands. The only roles that the Gbese and Ga stools had in land acquisition were to confirm such grants. In dismissing the appeal *Sowah J. A.* (as he then was) was of the opinion that "*whatever be the content of custom if it becomes an issue in litigation and the courts are invited to pronounce thereon any declaration made by the courts supersedes the custom however ancient and becomes law obligatory upon those who come within its confines. To the extent therefore that a declaration is inconsistent with a part of the content of a custom, that part in my view is abrogated*". For further reading see H.J.A.N. Mensa-Bonsu, *Of "nuts in the ground not being groundnuts"*, 22 *University of Ghana Law Journal* 1 (2002-2004).

¹⁰ Article 11(2) & (3). These articles provide:

(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.

(3) For the purposes of this article, "customary law" means the rules of law, which by custom are applicable to particular communities in Ghana.

For a further reading on this distinction see generally: Justice Modibo Ocran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 *Akron L. Rev.* 465-481 (2006) and K. Atta-Karikari, *General principles of Ghana Law* (1995) at 23-25.



Customary law is not a perfect source of law and is fraught with the disadvantage of excluding certain groups of people from enjoying their constitutional rights fully, in this case widows. Practices that are dehumanizing and injurious to the physical and mental well-being of a person should be prohibited. The State has come to the rescue of these disadvantaged groups in many ways particularly through enacting legislation to abolish practices such as widowhood rites that denigrate womanhood. Unfortunately we cannot boast of the efficacy of these laws. Some pieces of legislation passed in this regard are the Intestate Succession law¹¹ passed in 1985 and some amendments to the Criminal Code.¹² Some provisions have also been made in the 1992 Constitution to prohibit all these practices. The courts have also had their say¹³ on this subject matter but widowhood rites still persist.

My proposal is that to be able to advocate for change we need to understand the social and cultural contexts of these rites and how they relate to human rights. We need to be fully informed about these practices to be able to say that some of these rites should be amended, kept or done away. To be able to make changes or adopt policies for the betterment of the society as a whole both the chief and his subjects, the government and policy change makers, must be able to clearly explain the issues involved especially the human dignity of the person and the choices and options that exist.

The Chieftaincy Institution is guaranteed by the 1992 Constitution. A whole chapter is dedicated to this institution.¹⁴ Article 270 of the Constitution does not only guarantee the chief's position in the legal and power structure of the country but his traditional councils as well. The Constitution also sets up the National and Regional Houses of Chiefs.¹⁵ These bodies are to consolidate the customary laws of Ghana by first of all studying the customs applicable to the various ethnic groups, interpreting them and then coming up with a unified system of rules of customary law. In so doing, it is hoped that customs that are repugnant to natural justice will be expunged.

The Constitution does not go further to tell us how these practices should be evaluated. Some guidelines are however provided for in the Chieftaincy Act.¹⁶ The Chieftaincy Act recommends three things to be done when a particular custom is uncertain or when it is desirable to change the custom. The National House of Chiefs, the highest Chieftaincy Institution, can institute proceedings for a declaration, alteration or assimilation of a particular customary law.

In May 2001 Chiefs, Parliamentarians and the Executive in a tripartite seminar on the Chieftaincy Institution and its governance in Ghana pledged to redouble *Nananom's*¹⁷ efforts to *undertake their*

¹¹ PNDCL 111 as amended by Intestate Succession (Amendment) Law, 1991 (PNDCL 264).

¹² 1960, Act 29 as amended by the Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602) and the Criminal Code (Amendment) Act, 2003 (Act 646).

¹³ See for example *Akorniga V. Akawagre* [1987-88] 2 GLR 562.

¹⁴ See chapter twenty-two.

¹⁵ Articles 271 and 274.

¹⁶ Chieftaincy Act, 1971 (Act 370) as amended as amended by the Chieftaincy (Amendment) Law, 1982 (PNDCL 25), Chieftaincy (Amendment) Decree, 1973 (NRCD 166), Chieftaincy (Amendment) (No.2) Decree, 1973 (NRCD 226) & the Chieftaincy (Amendment) Law, 1993 (PNDCL 307).

¹⁷ *Nananom* in the Akan language means "body of chiefs". This term has been an accepted term used for the whole body of chiefs in Ghana.



*constitutionally mandated responsibilities in such areas as codification of customs, as well as the elimination of obnoxious customs and practices that are seen as an affront to enlightenment, nation building, and socio-economic development.*¹⁸ The task ahead seems insurmountable considering many factors which Nana Arhin Brempong concisely summarises:

Similarly with regards to the study, evaluation and compilation of “socially desirable” customary laws and usages and the unification of customary laws and usages there are several problems. The first is the financial one of organizing studies of that magnitude; it’s unlikely that in these days of diminishing financial support for welfare services, the government would financially support such studies throughout Ghana. Secondly even if the logistical problems were resolved, the question will arise as to who would be acceptable as authoritative sources of knowledge about customary laws and usages, and whether their pronouncement would receive general acceptance in the present cultural mix in Ghana. The anthropologist’s “man who know” is rare and not easily unearthed in the present semi-urban and urban milieu. The attempt to find these laws, now generally regarded as periodically re-invented, would provoke endless wrangles; the setting for these laws and usages has radically altered. Thirdly it would be difficult to agree on “socially desirable customs”.¹⁹

This approach provided in the Constitution and the Chieftaincy Act, however plausible, will take a very long time to implement considering the fact that since the adoption of the Constitution in January of 1993 nothing has been done. Secondly, we cannot belabor the difficulties associated with this approach. We need to look at other alternatives at the moment while waiting for the National and Regional Houses of Chiefs to come up with solutions. An alternative worth exploring is the individual efforts of both the chief and community members through a consultative approach. After all in most communities there is still a sense of communal feeling and decisions and changes are done with the co-operation of everyone. Development must be culture sensitive. I believe that with this approach there will be a deeper and sustainable commitment to altering widowhood rites.

¹⁸ See Opening address by Odeneho Gyapong Ababio II, President of the National House of Chiefs at the tripartite seminar on good governance at Elimina, Ghana, 6th December 2003. (on file with author).

¹⁹ Nana Arhin Brempong, *Chieftaincy, An Overview, in* Chieftaincy in Ghana, 27, 39, (Irene K. Odotei & Albert K. Awedoba eds., 2006).



The Nayiri, Naa Bohagu (center back) is sitting in state with some of his elders (from left, Naachinaba (youth leader), Maasu's representative, Aakra, Samanaba (holding the staff) and sakpari to the right of Nayiri.). The stick represents his staff of office.²⁰

I have said elsewhere in this paper that customary law encompasses the uncodified rules of custom. The chief and his elders are the central authority for rule-making and rule-enforcement. We have also seen the chief's eminent role in shaping customary law to conform to modern values and practices. This power has often been overlooked and instead laws are passed by Parliament to abolish or to make it a crime to engage in dehumanizing practices. This path of action has woefully failed and many more women and sometimes men still suffer from when the elect customary law as their personal law. This brings us to the thrust of this paper which is to look at an alternative view, a consultative process of getting the customary law on widowhood rites to conform to the Constitution and International Treaties ratified by the Ghana.

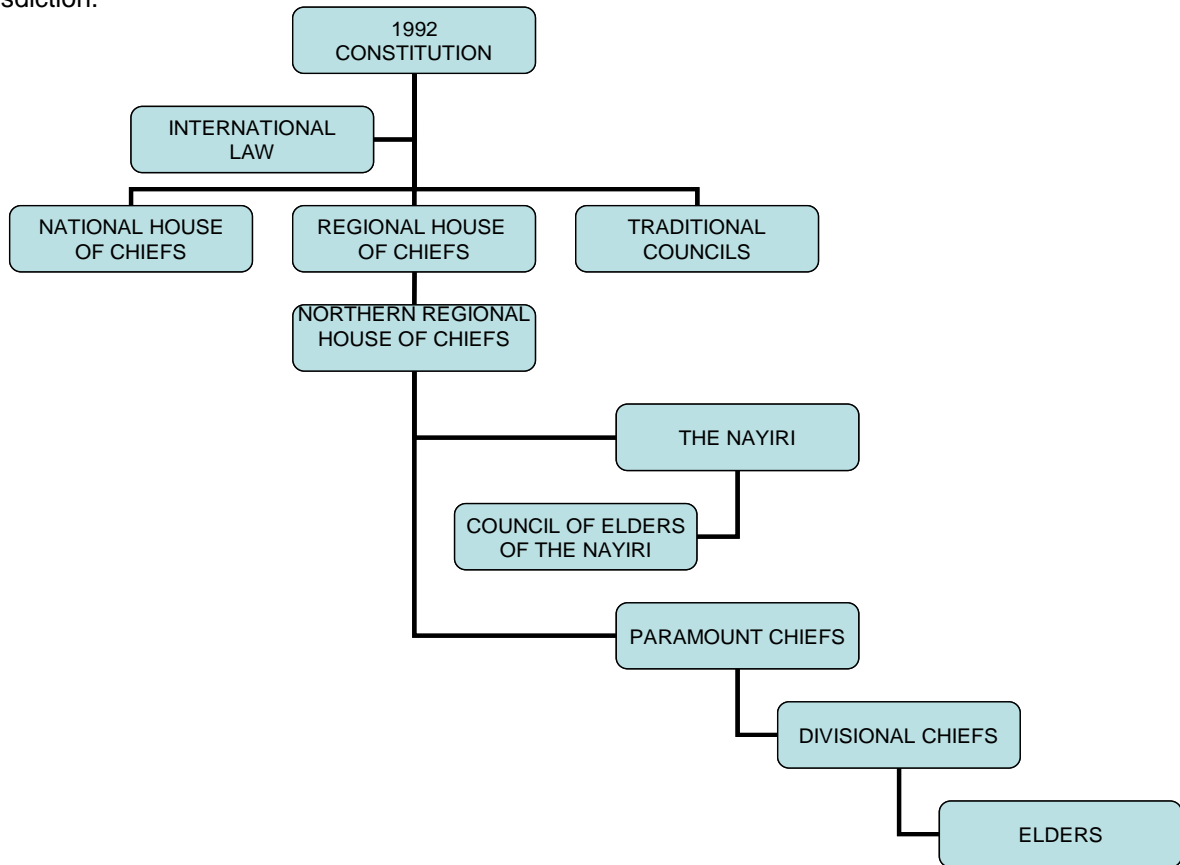
It is impossible to look at a detailed consultative process in this paper. The consultative process which I propose is tailored towards the Mamprusi chieftaincy power structure. In this structure, the *Nayiri*, the overlord of the Mamprusi people, has ten paramount chiefs under his supervision.²¹ These paramount

²⁰ Picture downloaded from the internet (source unknown, on file with author).

²¹ *Wulugunaba* who is a chief over the Kpasenkpe traditional area, *Soonaba* who is a chief over the Janga traditional area, *Wunnaba* who is a chief over the Wungu traditional area, *Kunaba* who is chief over Kurugu traditional area, *Bongonaba* who is a chief over the Bongo traditional area, *Nangodinaba* who is a chief over the Nangodi traditional area, *Sekotinaba* who is a chief over the Sekoti traditional area,



chiefs also have their own mechanisms for choosing divisional chiefs. The *Nayiri* and most of his chiefs have councils of elders which help them out in the day to day governance of areas under their chiefly jurisdiction.



The Mamprusi Chieftaincy system already has its own kind of deliberative process in the administration of the day to day affairs of the community— meetings of chiefs and elders every week, meeting of chief, elders and all able-bodied men of the community, the meetings of the *Nayiri* and his subordinate chiefs etc. These processes should be enhanced and looked at in greater detail. The scope of my paper did not allow me to do an analysis of the already existing structure but I suggest that further research and analysis must be done in this area for effective realization of women rights through the deliberative process.

I draw inspiration from the methods of grassroots education for the deliberative process I propose.²² In this process no one takes the central role or to put it in a different way everyone's voice is

Tongorana who is a chief over the Tongo traditional area, *Bunkpurugunaba* who is a chief over the Bunkpurugu traditional area, *Yunyoorana* who is a chief over the Yunyoo traditional area.

²² These methods were taught in a course: Community Action for Social and Economic Rights at the Harvard Law School by Prof. Lucie White of which I was a student. For further reading see Paulo Freire, *Pedagogy of the Oppressed* (1970); Rick Arnold et al., *Educating for a Change* (1995), Anne Hope & Sally Timmel, *Training for Transformation Book1* (3rd prtg 2003), Anne Hope & Sally Timmel, *Training for Transformation Book2* (3rd prtg 2003), Anne Hope & Sally Timmel, *Training for Transformation Book3*



heard and taken into consideration. The chief must ensure that at the end of the day the following should be the salient features of the deliberative process; *Respect and Understanding*: during meetings every issue must be broken down to the barest so that everyone with different backgrounds can grasp the concepts and apply them effectively; *Equality among the parties involved*: all parties present at meeting or taking part of this deliberative process should be given equal opportunities. At this process members of the community should be able to put aside their “titles and accomplishment” and deliberate with others as if they were their colleagues; *Local solutions*: if the process does get to the implementation stage then the community must make sure that the goals they propose are specific, measurable, attainable, realistic and time bound and *Empowerment of the people*: this feature is a must and must be dealt with first before any part of the process.

Of course the challenge or obstacle which will be encountered is the fact that both men and women go through these rites and so why should women be singled out. The *Nayiri* himself who is “owner” of the community goes through the rites and does not complain. The *Nayiri* although independent must listen to his people and if the community is divided on what should be done about these rites then the process might take longer than expected. For this challenge to be overcome there needs to be a thorough understanding of the complications and consequences involved in these rites and what it means for women and men alike. For example, concrete evidence to show that some diseases are exacerbated by some of these rights might help. Modern medicine might also be brought in here to show the causes of death.

A second challenge for the deliberative process is the power dynamics within the community. Women are and should be submissive at all times even if she has contrary views. This challenge can also be overcome. We are in a modern democratic era with democratic principles. CBOs, NGOs and women government officials working in this community can simply help take off this barrier for effective communication. They can even go further by providing trainer of trainers workshops for the *Nayiri* and his entourage of chiefs and elders on the details of modern governance and how laws within this system should operate. Fortunately, some of the chiefs are statesmen and so the transition might not be that difficult. They can also act as liaisons in the first instance and then opt out of the process once the women are empowered enough to take up their own challenges.

Legal pluralism although very important in our legal system comes with fundamental difficulties which are very real and this show clearly in the Ghanaian polity. Whether we like or not customary law has hindered the development of most African women. But this is also not to say that customary law and our human rights system are mutually exclusive rather they complement each other in a special way. The Chieftaincy Institution is also adapting to modernity. Just recently a proposal has been put forth to come up with a code of ethics for all chiefs in the country. Their role in the developmental process of the country is very important. Most chiefs are no longer ignorant of state laws and the mechanisms of the

(3rd prtg 2003) and National Congress of Neighborhood Women, *The Neighborhood Women's Training Sourcebook* (1993).



government. Increasingly king makers and community members tend to elect chiefs who have gone through some type of formal education and are conversant with the fundamental human rights of their subjects. Chiefs are the best agents to modify dehumanizing customary practices. In the case of Eshum V. Johnfia²³ Twumasi J points out the instrumental role the custodians of customary law play in molding it to conform to modern trends:

Since customary law consists of the customs and usages of the people, it is the people themselves who can change or modify it...since customary law is elastic and progressive, our people who live in the modern world should be credited with the capability to adapt their customs and usages to modern situations without any coercion from an external authority. Once external coercion, judicial or legislative, is brought to bear on the customs and usages of the people, there is bound to be the polarization of what is actually practiced by the people in their day to day lives on the one hand, and the judicial decisions or legislative enactments on the other. There should always be a judicious parallelism between the law making process and the advancement of the practices, customs and usages of the people to avoid frustration.

The consultative process that I suggest should be employed for this process in the Mamprusi community is definitely not the absolute way to approach the problem of degrading widowhood rites. Other communities have approached the situation in different ways which are also equally important. The consultative process I put forth conforms to the power structure of the Mamprusi. It will be a futile effort to expect that a paramount or divisional chief should initiate the process without involving the *Nayiri*. The *Nayiri*, the overlord of the Mamprusi on the other hand can mobilize his chiefs and people to deliberate on the matter to yield better quality changes. Some have argued that the whole system of widowhood rites should be expunged from the customary law books while others have argued that some parts should be kept and yet others say nothing should be changed. My job in this paper is not to suggest a right or wrong answer rather I lay down a possible framework within which the people can work from to come to an expected conclusion.

Of course the journey that I suggest to be taken is not an easy one. In this male dominated society advocating for a change in the lives of a woman might be an abomination. So many questions and concerns will be raised—how do we know whether the widow killed his husband? How do we know the widow is not a witch? If we allow the widow to inherit her husband then the family will lose all their family property, the rituals are for a purpose so why should they be modified? Difficult questions as they maybe, there is however no doubt in my mind that the present *Nayiri* is ready for change and willing to work anyone who is ready to move Mamprusi forward.²⁴

²³ [1982-83] GLR 441 at 452.

²⁴ I have met him personally several times and have had conversations with him regarding the future of the Mamprusi's.



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In conclusion I say that whiles we are attempting to promote the human rights of an individual we must also take into consideration the communitarian aspects of customary law. Law reform in the area of customary law creates long term possibilities but in the mean time something has to be done.