Journal of Forensic Sciences And Criminal Investigation
ISSN: 2476-1311

Juniper Publishers key to the Researchers

Research Article
Volume 20 Issue 3 - April 2026
DOI: 10.19080/JFSCI.2026.20.556038

J Forensic Sci & Criminal Inves

The Principle of Nemo Tenetur Se Ipsum Accusare in the Context of Asset Forfeiture. The Unconstitutionality of Shifting the Burden of Proof in Peru

Denis Adan Aguilar Cabrera*

Universidad Nacional Mayor de San Marcos, Perú

Submission: March 31, 2026; **Published:** April 14, 2026

***Corresponding author:** Denis Adan Aguilar Cabrera, Universidad Nacional Mayor de San Marcos, Perú, Email: denisac.abogado@gmail.com

Abstract

The Peruvian legislature incorporated asset forfeiture through Legislative Decree 1373 as an independent asset seizure mechanism aimed at dismantling the economic infrastructure of organized crime and corruption. However, its Preliminary Title reverses the burden of proof; it is sufficient for the prosecution to point to evidence of illicit activity for the affected owner to have to prove, positively and exhaustively, the lawful origin of their assets. This provision directly clashes with two pillars of the Peruvian constitutional state: the principle of nemo tenetur se ipsum accusare, which prohibits requiring anyone to contribute to their own incrimination, and the presumption of innocence, which must inform all state actions.

This manuscript demonstrates that this reversal of the burden of proof is unconstitutional and requires a specific correction: restoring the burden of proof to the State, without sacrificing the legitimate goal of recovering illicit assets. The research employs a rigorous qualitative methodology-systematic doctrinal analysis, comparative review of national and international regulations, exhaustive study of the Constitutional Court's jurisprudence, and triangulation using coherence matrices extracted directly from primary sources-without resorting to surveys or quantitative models.

The findings reveal that asset forfeiture not only materially violates the presumption of innocence but also transforms citizens into unwitting accomplices in their own financial condemnation, generates structural procedural inequality, and discourages formal economic activity in a context of high informality. Furthermore, regulatory and operational deficiencies exacerbate the violation of due process and property rights. The conclusion is clear, only the reinstatement of the traditional accusatory system -with the burden of proof resting with the State, accompanied by reinforced procedural guarantees and a strict standard of proof- can reconcile asset forfeiture with the inalienable rights enshrined in the Constitution.

Keywords: Nemo Tenetur Se Ipsum Accusare; Asset Forfeiture; Reversal of Burden of Proof; Presumption of Innocence; Extinction of Domain; Constitutional Unconstitutionality; Peru

Introduction

The forfeiture of assets in Peru, established by Legislative Decree 1373, aims to deprive individuals of illicitly obtained property. However, its application has generated serious tensions with essential constitutional principles. The core of the problem lies in the reversal of the burden of proof. It is no longer the State that must demonstrate, with solid evidence and within a regular criminal process, that the assets originate from criminal activities, but rather the affected party must prove their lawful origin.

This reversal directly undermines the presumption of innocence [1], a cornerstone of the rule of law, according to which no one can be considered guilty without a final judgment following a fair trial. The procedural imbalance resulting from this reversal compromises the fairness of the system, facilitating the loss of property without prior conviction, which undermines legal certainty and fosters insecurity among citizens. Many avoid investing in or acquiring property for fear of losing it without

having committed any crime. Furthermore, third parties acting in good faith -such as legitimate buyers- are exposed to losing their rights without effective protection, weakening trust in civil and commercial transactions.

Although the measure aims to combat corruption and organized crime, its current design could have counterproductive effects, eroding the credibility of the judicial system, generating arbitrary actions, and undermining citizen cooperation [2]. To be legitimate and effective, it must be urgently reformed to restore the burden of proof to the State, demand rigorous standards of evidence, and guarantee full procedural safeguards. Only in this way can it achieve its purpose without sacrificing the fundamental rights that underpin democracy.

The Conceptual Foundations of the Nemo Tenetur Principle

The principle as a fundamental guarantee of the accusatorial system

The principle of presumption of innocence is the most visible limit to the State's punitive power within the Peruvian criminal process. Its foundation lies at both the constitutional and supraconstitutional levels. The Political Constitution of Peru, in Article 2, paragraph 24, subparagraph e, explicitly establishes that "every person is considered innocent until proven guilty in a court of law" [3]. This provision is not a mere formal proclamation, but a fully binding norm that conditions the legitimacy of the entire procedure.

From a procedural perspective, [4] emphasizes that it is a fundamental right whose procedural dimension demands full respect throughout the process; otherwise, the process would be illegitimate and unconstitutional, given that it directly affects personal liberty -one of the most protected legal rights-. Furthermore, it is specified that the presumption operates "regardless of the degree of plausibility of the accusation," since innocence persists until a final criminal judgment expressly declares guilt and the penalty, following a prior trial [4] Ultimately, neither the seriousness nor the appearance of the accusation can replace the certainty that only emanates from a final judicial pronouncement.

The presumption of innocence is not a mere procedural formality, but a structural principle that underpins the entire Peruvian criminal justice system. Felices [3] defines it as a "guideline that marks the path to be followed by the criminal process," that is, a normative guide that orients each stage of the proceedings. Its essential function is to limit state action in relation to the power to punish, granting the accused a kind of immunity against arbitrary or disproportionate interventions that affect their fundamental rights. This limit is not abstract: it is primarily realized in the protection of personal liberty and human dignity. Felices [3] emphasizes that its purpose is to achieve "the just balance between the State's interest in repressing crime and the accused's interest in safeguarding their liberty and dignity."

And he clarifies that, in cases of doubt, this balance must decisively favor the protection of the individual. For his part, Miranda [5] reinforces its constitutional character by specifying that every person accused must be considered innocent "until there is a final, enforceable conviction, notified in writing to the parties." Furthermore, he emphasizes that this right is not only enshrined in the Constitution, but also in international treaties -such as the American Convention on Human Rights- which provides it with an even more solid and binding legal basis for the entire criminal process [6]. In the Peruvian accusatory system, the burden of proof rests exclusively with the accuser, especially the Public Prosecutor's Office, as the holder of the public right to initiate criminal proceedings [3].

This attribution is not merely formal; it constitutes a normative requirement expressed in Article IV.1 of the Preliminary Title of the Code of Criminal Procedure, which reflects the internal logic of the system -where innocence is the initial and permanent legal status of the accused. Therefore, the direct consequence is that it is incumbent upon the accuser to conclusively prove the facts of the accusation; if they fail to do so, the only legally valid decision is acquittal- not as an act of leniency, but as the inevitable result of the persistence of the presumption of innocence [3]. The Constitutional Court has ratified this understanding in Case No. 00721-2022-PHC/TC, categorically stating that "the accused are not obligated to prove their innocence," in strict adherence to the principle (p. 93).

However, the same ruling introduces an important nuance, there is a "minimum expectation" that the accused will prove, at least partially, the facts invoked in their defense. This expectation seeks to balance the protection of the right to the presumption of innocence with the need for an active defense, without altering the essential rule: the burden of proof continues to rest entirely with the prosecution (pp. 93–94). The principle nemo tenetur se ipsum accusare -no one is obligated to testify against themselves- is not merely a tactical rule, but a logical and necessary consequence of the accusatory structure of criminal proceedings [7].

Peruvian constitutional jurisprudence, particularly the Constitutional Court's ruling in Case No. 01070-2023-PHC/TC, clearly states that "it is the accuser who must present sufficient evidence to establish the criminal responsibility of the accused, and not the other way around" (p. 94). This statement implicitly but unequivocally contains the guarantee against self-incrimination, if the accused is not responsible for proving their innocence, they cannot be forced to produce evidence that contributes to their own conviction.

Justice Gutiérrez Ticse's concurring opinion in Constitutional Court Case No. 01234-2023-PHC/TC goes further, explicitly stating that "the burden of proof in criminal proceedings rests with the

How to cite this article: Prakhar P, Maheswari M, Arshad PM, Ashish Kumar Y. Lightning Strike-Induced Damage: A Forensic Case Report of Textile Evidence. J Forensic Sci & Criminal Inves. 2026; 20(3): 556036. DOI: 10.19080/JFSCI.2026.20.556036

prosecution, not the accused," basing this on the presumption of innocence enshrined in both the American Convention on Human Rights and the Political Constitution of Peru (p. 94). Furthermore, he cites the Inter-American Court's doctrine, according to which "the accused does not have to prove his innocence; rather, it is the responsibility of the accuser to provide conclusive evidence of guilt," and emphasizes that "any doubt must benefit the accused," thus applying the principle of in dubio pro reo as an indispensable condition for any legitimate conviction [8].

Miranda [5] explains that "the right to the presumption of innocence, according to several legal scholars, originated in the French Revolution of 1879, where the importance of the 'Declaration of the Rights of Man and of the Citizen,' specifically Article 9, was paramount." This article forcefully proclaimed: "Every man shall be presumed innocent until proved guilty. If it is deemed indispensable to arrest him, any force not necessary to secure his person shall be severely repressed by law [9]. This formulation is not merely a historical fact; it reveals that the presumption arose as a barrier against repression based on suspicion, without the need for proof.

Institutions such as asset forfeiture -which operate with lower evidentiary standards and shift the burden of proof to the affected party- risk reinstating authoritarian logics that modern constitutionalism sought to eradicate. Furthermore, Felices [3] notes that this principle, at the universal level, is enshrined in Article 11, paragraph 1, of the Universal Declaration of Human Rights, which states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which all the guarantees necessary for his defence have been ensured." Thus, this guarantee ceases to be a mere national procedural rule and becomes a binding standard of international law.

The presumption of innocence, its role as a limit to the judge's free evaluation of evidence. Felices [3] expresses it precisely: "through the principle of the presumption of innocence, it is guaranteed that no person subject to the law can be convicted or declared responsible for an unlawful act based on arbitrary or subjective assessments or on evidence in whose evaluation there are reasonable doubts about the guilt of the sanctioned individual." This statement is not theoretical; it carries particular weight today, when certain procedures relax evidentiary standards [10]. Consequently, "the essential content of the right to the presumption of innocence, in this way, ends up becoming a limit to the principle of free evaluation of evidence by the judge, since it establishes the requirement of a minimum of evidentiary sufficiency to declare guilt beyond a reasonable doubt" [11].

That is to say, the judge cannot substitute solid evidence with mere conjectures, however reasonable they may seem. The doctrine of the Inter-American Court, citing the Maqueda v. Argentina, where the Court affirmed that "this principle establishes a presumption in favor of the accused of a crime, according to which he is considered innocent until his criminal responsibility has been established by a final judgment" (cited in Cedeño. And it adds: "the accused must be considered innocent until his guilt is proven" and that "the sentence of conviction and, therefore, the application of a penalty can only be based on the certainty of the court that decides about the existence of a punishable act attributable to the accused, in accordance with international norms" [12].

The Normative Status of Nemo Tenetur in Peruvian Constitutional Law

The principal nemo tenetur se ipsum accusare -no one is obligated to accuse themselves-is not expressly stated in the Political Constitution of Peru, but its validity arises from a systematic and coherent interpretation of fundamental procedural guarantees. Furthermore, the presumption is not only a subjective right but also an objective guarantee, as it contains concrete mechanisms for its effectiveness against state power [3]. This dual dimension -subjective and objective- characterizes fundamental legal positions in criminal matters and reinforces the constitutional protection of the accused.

The jurisprudence of the Peruvian Constitutional Court has been remarkably and maturely defining the limits between the state's burden of proof and the right against self-incrimination. In Case No. 00721-2022-PHC/TC, the Constitutional Court affirmed that "the accused are not obligated to prove their innocence, adhering to the principle of presumption of innocence," but clarified that there is a "minimal expectation" that they will at least partially prove the facts they invoke in their defense (p. 93). This distinction is key; it does not shift the burden of proof, but rather requires minimal cooperation in the defense arguments, without violating the essential core of the principle.

In another relevant case, Case No. 01927-2023-PHC/TC, the Constitutional Court reiterated that "it is the responsibility of the Public Prosecutor's Office, as the accusing body, to present sufficient evidence to demonstrate the guilt of the accused, while the accused enjoys the presumption of innocence until proven otherwise" (p. 94). There is a structural and inseparable connection between the principle against self-incrimination and the right to defense. Paredes and Urrutia [13] clearly express this: "Together, the presumption of innocence and the right to a defense form the basis of criminal procedural law, ensuring fair treatment for all parties involved." This interdependence means that any weakening of one directly affects the other.

The right to defense, according to the same authors, is an essential mechanism for reaffirming innocence and guaranteeing that the process unfolds under the principles of justice and equity [14]. It is not limited to legal assistance; it includes the right to remain silent without adverse consequences. This right is, precisely, the most immediate manifestation of nemo tenetur. By requiring the defendant in asset forfeiture proceedings to prove

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the legality of their assets, the system effectively turns them into a forced collaborator of the state prosecution [12]. Thus, their right not to contribute to their own incrimination is neutralized, and the presumption of innocence is emptied of meaning, transforming it into a mere formality. Constitutional protection is eroded when the burden of proof is shifted without sufficient guarantees.

The constitutional limits on any requirement for procedural cooperation are governed by the principle of proportionality. As legal doctrine points out, "any restriction on fundamental rights must be duly justified, necessary, and proportionate." This standard is the only valid framework for evaluating whether a burden imposed on the litigant -such as proving legality in asset forfeiture proceedings- is legitimate. However, jurisprudence warns that "the lack of clarity in the criteria governing asset forfeiture, as well as the ambiguity in the notion of 'illicit origin,' can open the door to interpretations that undermine legal certainty and the right to due process." This imprecision prevents citizens from knowing what they must prove and how to do so, thus undermining their ability to defend themselves.

The Constitutional Court has reiterated that "any measure that limits fundamental rights must be proportionate, clear, and duly justified" (Constitutional Court Ruling No. 05041-2015-PA/TC, cited on p. 102). To be constitutional, the reversal of the burden of proof should pass a rigorous test of suitability, necessity, and proportionality in the strict sense. The argument presented here is that, under its current design, this test is not met. The difference between the Peruvian and Colombian constitutional frameworks regarding asset forfeiture is structural. Palomino [15] points out that "in Colombia, asset forfeiture is supported by Article 34 of the Constitution and is recognized as an action of a constitutional nature," while in Peru "the process is regulated by an ordinary law." This lack of explicit constitutional support requires more rigorous scrutiny of its provisions.

Although Article 159.1 of the Peruvian Constitution grants the Public Prosecutor's Office the power to "initiate legal action ex officio or at the request of a party in defense of legality and public interests," Palomino [15] clarifies that this power "is appropriate and legitimate for the Prosecutor's Office to initiate and direct the investigation," but does not in itself legitimize the reversal of the burden of proof. Rivera [16] reinforces this distinction: "Unlike in Peru, in Colombia this mechanism is based on a different constitutional framework, which grants it its own constitutional legitimacy." Therefore, when regulating it through ordinary law, the Peruvian legislature must observe with rigor the constitutional limits on state power, especially the principle of nemo tenetur (no one may be held responsible for their actions).

The prohibition against the retroactive application of asset forfeiture protects legal certainty and the right against self-incrimination. Ghazzaoui [17] categorically states that "asset forfeiture can only be applied prospectively; that is, it only affects situations that occurred after its enactment." This rule derives from the principle of legality and avoids requiring anyone to prove the legality of assets acquired before the existence of the rule that reverses the burden of proof. However, the imprescriptibility of the action raises tensions. Ghazzaoui [17] acknowledges that "this allows the State to act at any time," since "allowing the passage of time to grant legal recognition to illicitly obtained property would be incorrect." However, the reversal of the burden of proof, this imprescriptibility, generates uncertainty: citizens could be forced to preserve evidence of the origin of their assets for decades, which constitutes a disproportionate burden. Thus, not only is legal certainty affected, but also the essential core of the right not to cooperate in one's own incrimination.

The Principle Beyond the Criminal Process: Its Applicability to Non-Penal Sanctioning Procedures

The classic distinction between criminal and non-criminal law has weakened in the face of sanctioning mechanisms that, despite their name, produce material effects equivalent to penalties [18]. Extinction of ownership exemplifies this trend. Palomino [15] defines it as a hybrid phenomenon -civil and criminal- that is part of the evolution of law and possesses special characteristics; its mixed nature does not justify the exclusion of fundamental guarantees against the state's punitive power. Vargas [19] explains that, although initially it fell under the jurisdiction of the criminal court, subsequent jurisprudence consolidated its formal autonomy, it is an independent procedure, even separate from the criminal process.

However, this procedural separation does not neutralize its punitive substance; it imposes the definitive and uncompensated loss of property rights. The core of the problem lies in whether a mere formal classification -"non-criminal"- can deprive the individual of essential protection. The thesis rejects this possibility, demonstrating that asset forfeiture operates as a de facto penalty, without offering the guarantees inherent in criminal proceedings [20]. Current legal doctrine recognizes a "third way" of sanctions, intermediate between criminal and administrative law, where asset forfeiture finds its place. Padilla [21] emphasizes that it is promoted by the Public Prosecutor's Office through a civil process that is independent of the criminal sphere, but this does not negate its eminently punitive function.

Palomino [15] summarizes the doctrinal debate: from a criminal perspective, some see it as a confiscation penalty or as separate from criminal proceedings, although Santander points out that the Constitutional Court has questioned this characterization. From a civil perspective, it is understood as a patrimonial consequence of illicit conduct, from an administrative perspective, as a state intervention in the exercise of jurisdictional and administrative functions. This plurality of interpretations demonstrates the impossibility of rigidly categorizing it.

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The decisive factor is not the label, but the intensity of the impact on fundamental rights -and, therefore, the minimum level of guarantees that must accompany its application. Constitutional jurisprudence has extended the principle of proportionality to non-criminal sanctioning procedures, requiring that any restriction on fundamental rights be "clearly justified and proportionate" (p. 8). This standard, originating in the criminal sphere, is also unavoidable wherever essential rights are affected, regardless of the formal nature of the procedure.

Ghazzaoui [17] emphasizes that forfeiture of ownership has "its own nature and characteristics." Although it entails the loss of assets, it does not eliminate all attributes of property -such as use or enjoyment- but it does eliminate ownership without any compensation. This absolute deprivation constitutes a restriction of the utmost severity on the right to property, whose social function is also at stake. The Colombian Constitutional Court, in ruling C-1007 of 2002, reiterated its "ex officio, autonomous, real, and patrimonial" character [19]. However, this autonomy does not imply a detachment from constitutional guarantees; rather, it requires the construction of a specific procedural framework, endowed with effective safeguards, commensurate with the severity of the imposed consequence.

A central debate revolves around the applicability of the presumption of innocence to asset forfeiture. Villeda [22] argues that this process clashes with this guarantee, since it begins without a prior criminal sentence, although he clarifies that its purpose is to evaluate "the legality of the origin of an asset," not to judge the individual. Nevertheless, stating that "the focus is on the legal status of the assets, not the people" is insufficient, the owner suffers an adverse consequence equivalent to a penalty -the definitive loss of their property- which should trigger guarantees inherent to criminal law.

Reducing the analysis to the "legality or illegality of the asset," as Villeda [22] suggests, obscures the fact that this classification directly impacts their legal sphere. Catz [23] adopts a more critical stance, he points out that, under a "soft" and civil discourse, what occurs is a confiscation -the loss of a right due to illegal activities- without a prior conviction. This, he warns, violates the principle of legality in criminal law: there can be no punishment without a prior criminal law. The forfeiture of ownership is formally configured as an in-rem process, directed against assets, not against the people.

This characterization has served to exclude criminal guarantees. Villeda [22] explains that it unfolds "completely independently of any criminal liability of the owner," since what is relevant is not their connection to illegality, but rather the link between the illicit activity and the origin or use of the asset. But this distinction cannot be absolute: although the process addresses aspects distinct from criminal law, its autonomy does not exempt the affected party from minimum protection. In fact, Villeda [22] clarifies that its objective is to determine whether the assets originate from illicit activities or were used for them -two separate, but equally burdensome, dimensions. The case of the "front man" illustrates this, even if he does not participate in the conduct, his economic inability to justify the possession of high-value assets can trigger the process [24].

There, the reversal of the burden of proof forces him to demonstrate the impossible, revealing its true punitive dimension. The forfeiture of ownership directly engages with the jurisprudence of the European Court of Human Rights, particularly with the autonomous notion of "criminal prosecution" established in Engel and Others v. The Netherlands . According to this standard, not only must the internal classification of the procedure be assessed, but also its nature and the severity of the sanction. Palomino [15] points out that it involves "the transfer of ownership of assets obtained through illicit activities to the State, by means of a judicial sentence with due process; unlike other processes, it does not contemplate compensation."

This definitive loss without restitution constitutes a sanction of comparable, and even greater, severity than many pecuniary penalties. Applying the Strasbourg criteria, the procedure should be considered criminal for the purposes of the Convention. Palomino [15] adds that it is "an autonomous and special process, of a real nature, conducted before specialized courts," aimed at persons who hold rights over illicit assets, with the purpose of declaring their forfeiture in favor of the State. Judicial specialization does not lessen its punitive substance.

A common argument for excluding criminal guarantees from asset forfeiture is the alleged lack of a mens rea (a specific, factual element), since assets do not possess subjective culpability, it is argued that there is no place for protection directed at the individual. Ghazzaoui [17], expresses it this way "assets cannot be considered guilty or innocent; they are only attributed a legal status of lawful or unlawful." But this abstraction ignores the fact that the declaration of unlawfulness directly impacts the owner, depriving them of their right without compensation.

Ghazzaoui [17] further distinguishes between assets that are unlawful due to their origin -illegal provenance- and those that are unlawful due to their destination -use in crimes- which reveals, in many cases, an objective connection with the owner's conduct. His assertion that "unlawfulness does not generate rights" is valid in the abstract, but it does not resolve how to determine that unlawfulness without affecting fundamental guarantees [25]. The reversal of the burden of proof shifts the risk of lack of evidence onto the affected party, contradicting the basic principle that the burden of proof lies with the accuser.

The solution does not lie in rigidly applying all criminal guarantees, but rather in adopting a functional approach: identifying those that protect substantial interests also vulnerable in asset forfeiture proceedings. The principle of nemo tenetur -the

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right not to incriminate oneself- is one such guarantee. Padilla [21] points out that "all affected persons are guaranteed access to adequate means of defense to demonstrate the lawful origin of the assets." However, this guarantee is rendered meaningless if exercising entails assuming a disproportionate burden of proof, which can lead to self-incrimination.

The right not to testify against oneself must prevail beyond formal labels. The thesis concludes, after analyzing constitutional jurisprudence, that any restriction on fundamental rights must be duly justified, necessary, and proportionate. Applied here, this means that reversal of the burden is only admissible if the right against self-incrimination is expressly safeguarded, prohibiting the use of silence as evidence and ensuring that evidence provided to justify legality cannot be used in a future criminal proceeding.

The Reversal of the Burden of Proof Under Decreto Legislativo 1373 (Peru)

The mechanism for reversing the burden of proof in asset forfeiture proceedings is based on Article 2.9 of the Preliminary Title of Legislative Decree 1373, which establishes a two-phase sequence. First, the Public Prosecutor's Office must provide "reasonable evidence" regarding the illicit origin or destination of the asset. Then, once the claim is admitted, the defendant must demonstrate its lawful origin or destination. This structure breaks with the traditional logic of the burden of proof.

The cited jurisprudence clarifies that it operates under a system of dynamic burdens of proof, where each party must present the evidence, they can best obtain. That is, the prosecutor provides initial evidence, and the affected party, once notified, must prove their good faith or the lawful origin of the asset. This reversal is justified by the nature of the assets -frequently linked to organized crime- arguing that since the assets subject to forfeiture are usually related to crimes, it is reasonable to require the possessor to prove their lawful origin. But this reasoning rests on an unproven presumption, illegality itself.

The two-phase mechanism is not merely formal; it is a dogmatic pillar. In the first phase, the standard for the Public Prosecutor's Office is "reasonable indications," not conclusive proof. Filomena [26] specifies that the Prosecutor's Office must demonstrate two things: that a legal ground for forfeiture exists and that the affected party is not a bona fide third party nor did they act without fault. Once the claim is admitted, the burden shifts entirely: "on the affected party's side, it is up to them to demonstrate that they acted in good faith or that the accusations are unfounded."

If the grounds concern the origin of the assets, it must be proven that the money came from legal sources. The document emphasizes that the evidence is dynamic, as each party has the responsibility to support their claims with evidence. However, this dynamism does not imply balance: the prosecutor's silence prevents the process from beginning, but the affected party's silence, once in court, can seal their financial loss. The burden is not shared: it is shifted, and with it, the risk of defeat.

The standard of "reasonable indications" that the Public Prosecutor's Office must meet to trigger the reversal of the burden of proof is, according to the document, one of the most debated points of the system. It is a much lower threshold than the criminal standard ("beyond a reasonable doubt") and even the civil standard ("preponderance of the evidence"). Its justification lies in the real difficulty the State faces in directly proving the illicit origin of assets -for example, in cases of money laundering or organized crime.

The cited jurisprudence supports it teleologically, the reversal of the burden of proof is justified by the nature of the assets involved and the need to effectively combat organized crime, money laundering, and other illegal activities. But this purpose does not negate constitutional concern; lowering the evidentiary standard without objective controls can lead to arbitrariness. The document warns that, for the reversal to be valid, the prosecutor must have offered sufficient evidence or indications to support their claim. However, nothing clearly defines when an indication is reasonable; it is left to the subjective assessment of the judge, without fixed criteria or objective review.

Once the lawsuit is admitted, the burden of proof falls entirely on the affected party, with very specific requirements. Filomena [26] explains it precisely, they must demonstrate "that they acted in good faith or that the prosecution's accusations are unfounded." In cases where the asset originates from illicit funds, the person must prove that the money used to acquire the property or assets came from legal sources. When the asset was used as an instrument of the crime -such as a vehicle for trafficking-, "it will be quite complicated to prove their innocence" [26]: this difficulty is not a flaw in the system, but rather part of its logic.

Furthermore, good faith is not generic; Article 66 of the regulations of Legislative Decree No. 1373 requires "qualified good faith," understood as loyalty, integrity, and special care in the acquisition. Ignoring the origin is not enough; Active, rigorous, and documentable diligence is required. Thus, the burden is not only reversed but intensified, transforming the defense into a technically demanding task and, in many cases, materially impossible without access to records that the State itself controls or has obstructed. The specialized judge is not a mere passive arbitrator; they actively intervene from the outset, deciding which evidence to admit or reject.

Filomena [26] describes the procedure: ten days after notification of the lawsuit, the parties may propose evidence, request additional evidence, or object to the lawsuit; the judge decides by court order what is incorporated into the proceedings. Admissible evidence includes site visits, interviews with witnesses, or bank statements -a remarkable range- but without clear legal criteria for assessing their weight. Evidence is required

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to be "relevant, admissible, and suitable," that is, it must convince the judge of the existence of the grounds for termination.

However, this requirement can prejudice the defendant if the link between evidence and illegality is not obvious. Furthermore, the chain of custody is mandatory; it must be documented who handled each piece of evidence from its collection to the trial. If it fails -due to omission or irregularity- the evidence can be invalidated [26]. And although the law does not explicitly state this, the document suggests that the burden of proof regarding the regularity of this chain lies with the State, not the affected party.

Early disposal is a critical feature, allowing the SAE (Special Assets Society) to sell assets before a final judgment, under three conditions, that they are already subject to a precautionary measure, that their administration is more costly than their sale value, or that their location or risk makes them difficult to safeguard [26]. This early availability seriously complicates the defense. If the asset is sold and later declared legal, the affected party only receives financial compensation, the calculation of which is neither regulated nor guaranteed to be truly equivalent.

If, at the end of the process, the asset is not forfeited, the SAE must return it or compensate for its value, but this does not resolve the actual loss of the asset or the uncertainty regarding the amount. There is also the "early judgment of forfeiture": a mechanism where the defendant accepts the illegality of the asset in exchange for retaining 5% of its value [26]. It is, in essence, a forced admission of guilt, introducing economic and psychological pressure that can induce defendants to waive their burden of proof, not for lack of arguments, but due to the practical impossibility of resisting the process.

In practice, there is no dynamism; after the prosecutor's "reasonable indications," the burden shifts entirely to the defendant, irrevocably, without any counterbalance. It is presented as one of the most innovative and distinctive aspects of the process, but this innovation comes at a cost: it makes the accused the one who must prove their innocence, violating the principle of nemo tenetur se ipsum accusare (no one is responsible for accusing themselves).

Jurisprudence attempts to mitigate this; in Case No. 06-2020-Lambayeque, the court argued that it seeks to balance the procedural burdens, since it would be "disproportionate to require the prosecutor to prove the legality of all assets" linked to money laundering. But this balance is illusory if the initial threshold requires nothing more than a suspicion disguised as technicality. However, it also warns that it has been criticized, as some see it as contrary to the principle of presumption of innocence. This contradiction is not a minor detail; it is the heart of the problem.

The threshold that opens the door to the process is established in Article II, section 2.9 of Legislative Decree 1373: "For the admission of the claim, it is the responsibility of the prosecutor to offer evidence or reasonable indications of the illicit origin or destination of the asset." This is the only filter prior to the defendant having to justify their assets. Legal scholars have attempted to clarify this. Gamarra [27] points out that "reasonable indication" is neither mere suspicion nor conjecture, but neither is it conclusive proof, it occupies an intermediate point where objective elements allow one to infer, with a certain degree of qualified probability, the illicit connection.

But this point is not defined by law. There are no clear criteria, examples, or limits. Its determination is left to the subjective judgment of the specialized judge, who operates within a framework with a strong preventive bias. This vagueness is not neutral: it generates a real risk of arbitrariness, especially when the judge interprets "reasonable" based on the purpose of the process, not on the rights of the affected party. Without objective parameters, the threshold ceases to be a control and becomes a mere formality.

Distinguishing between circumstantial evidence and proof is not merely a technical matter; it is the axis around which the entire legitimacy of the process revolves. Circumstantial evidence is a known fact from which, through logical reasoning and maxims of experience, another unknown fact is inferred; proof, on the other hand, directly demonstrates it. But in asset forfeiture proceedings, both are equated; "reasonable circumstantial evidence or initial proof" is sufficient to admit the claim. This equivalence drastically lowers the state's threshold. In the criminal justice system, circumstantial evidence justifies precautionary measures, not convictions; here, it can indeed form the basis of a decision that extinguishes a real right.

Jurisprudence attempts to give it substance: in Case No. 06-2020-Lambayeque, the court speaks of "balancing the burden" given the complexity of money laundering. In Case No. 05-2020-Lima, it is argued that the defendant must counter the circumstantial evidence because their position as the holder of the right gives them greater ease in justifying its legality, a logic that reverses the guarantee. And although Case No. 097-2019-Lima requires "sufficient evidence" from the prosecutor, it does not define what "sufficient" means. Thus, the threshold remains empty: formally demanding, but substantially indeterminate.

The "reasonableness" of circumstantial evidence is, at its core, a subjective concept—and that is its greatest weakness. It depends entirely on how each judge interprets the case, without objective parameters. Circumstantial evidence that convinces one judge may seem weak to another, generating jurisprudential disparity and eroding legal certainty. Therefore, the lack of a standard of proof beyond a reasonable doubt seriously compromises the legitimacy of decisions, rendering them arbitrary. And this arbitrariness is even more dangerous in the initial phase, where the threshold is even lower.

Furthermore, in a country like Peru -with a high level of economic informality- what appears to be an indication of illicit

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activity (for example, the absence of receipts) may simply be the expression of a structural reality, many citizens lack access to formal records. Ghazzaoui reminds us that assets are not "guilty", they merely acquire a legal status of being either lawful or unlawful. Their "appearance of ownership" -that gap between what is registered and what is the case- serves to justify state intervention [17], but it does not resolve the central problem: where does "reasonableness" begin? Without that clear threshold, appearance becomes a pretext.

In complex cases -money laundering, shell companies, opaque financial structures- the notion of "reasonable evidence" becomes even more fragile. The reversal of the burden of proof is justified by the need to effectively combat organized crime and money laundering. But this objective cannot replace technical precision. Thus, in Case No. 004-2019-Lambayeque, it is argued that "the lack of proper registration of an asset in the public administration can be an indication of its illicit origin."

In Peru, where registration informality is systemic -due to state negligence, bureaucratic inefficiency, or citizen ignorance- this criterion equates administrative negligence with illegality. Even worse, in Case No. 05-2019-Tacna and Moquegua, it is asserted that good faith is "qualified," requiring "diligence and prudence" in the acquisition. This allows the prosecutor to present the mere absence of certain formal controls as evidence—and, already at the admission phase, shift the burden of proving such diligence. This breaks the two-pronged legal framework, the investment does not wait for the trial, but rather anticipates it, turning the admission into a tacit initial judgment.

The Tension Between the Reversal of the Burden of Proof and the Nemo Tenetur Principle

In Peru, Legislative Decree 1373 reverses the burden of proof in asset forfeiture proceedings. It is no longer the State that must prove the illicit origin of the assets, but rather the affected party that must affirmatively demonstrate their lawful provenance. This reversal is neither technical nor neutral; it transforms the citizen from a protected owner, presumed to possess legal assets, into an involuntary collaborator in the case against them. The affected party must provide accounting documents, witness statements, or explanations regarding economic flows -materials that, otherwise, would fall to the State to investigate and produce. As Ghazzaoui [17] points out, this imposes an "obligation to legitimize" a title that the legal system presumes valid until proven otherwise, effectively rendering the right to remain silent meaningless.

The citizen is trapped in a paradox: they must speak -and provide evidence- to avoid confiscation, even though that same evidence could later be used in a parallel criminal investigation. This establishes an institutionalized form of procedural self-incrimination, contrary to the principle of nemo tenetur (no one is liable). The distortion is exacerbated by Peru's high level of economic informality: many legitimate property owners lack formal records not due to illegality, but because their acquisitions occurred within family or customary economies, unrecognized by the legal system. Their inability to documentarily reconstruct their property history -ex post facto and under demanding judicial standards-is often interpreted as tacit acceptance of the state's presumption. The burden is not redistributed; the forced generation of incriminating material is demanded of those who should be protected.

The Peruvian procedural system is based on an accusatory model: the state accuses and provides evidence; the accused defends, without having to prove their innocence. Legislative Decree 1373 breaks with this logic by transforming the asset forfeiture process -formally autonomous and non-criminal- into a hybrid mechanism where the prosecution initiates the action with mere circumstantial evidence and then remains passive, while the affected party must actively rebut the presumption of illegality. This generates profound procedural asymmetry. As Filomena [26] explains, once the claim is admitted, the affected party not only refutes the allegations but must also provide positive proof of lawful acquisition, while the prosecution is exempt from demonstrating, beyond reasonable circumstantial evidence, the illicit origin or destination of the asset.

The judge then evaluates the sufficiency of the defense, not the strength of the accusation. Thus, the epistemic balance of the system is altered: instead of deciding whether the accuser fulfilled their burden, the judge decides whether the affected party managed to dispel a presumption that was never rigorously proven. The process takes on inquisitorial characteristics under a civil guise, the State sets the agenda with a simple allegation, and the citizens must "cleanse" their title before an authority that operates under a presumption of institutional legitimacy. Padilla [21] highlights that the law allows for precautionary measures prior to any hearing for the affected party, deepening inequality. The right to defense is reduced to producing counterevidence, not to challenging the state's evidence. This erodes the principle of nemo tenetur as a pillar of the adversarial system: the citizen becomes an auxiliary to the prosecution. The process ceases to be a contest between equals and becomes a test of the affected party's inability to refute an unvalidated state hypothesis, a structural reconfiguration that sacrifices the accusatory guarantee for the sake of patrimonial recovery.

The Unconstitutional Configuration of the Reversal of The Burden of Proof

The reversal of the burden of proof established in Legislative Decree 1373 does not simply modify a rule of evidence, it establishes, at the very heart of the asset forfeiture procedure, a structural presumption of illegality that the affected party must actively dismantle. Once the tax authority alleges evidence linking

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the asset to an illicit origin or destination, the citizen is no longer protected by the constitutional mandate that every person is presumed innocent until proven guilty by the State. Instead, the procedure treats the title as defective de jure, unless the owner provides affirmative proof of lawful acquisition.

Vargas [19] shows that this configuration obliges the owner to legitimize their own acquisition precisely because the legal system has reversed the initial position: the asset is considered tainted unless proven otherwise. The presumption of innocence, understood in its material dimension as a limit to state power, thus becomes its opposite: a duty to justify what the Constitution presumes to be legitimate. This violation is neither accidental nor remediable through judicial interpretation; it is a necessary and inevitable consequence of legislative design. The procedure dispenses with the requirement that the State prove, with positive evidence, the illicit origin or use of the asset.

It suffices for the tax authority to formulate a plausible causal link; then the burden falls entirely on the citizen, who must reconstruct the asset's economic history in the language required by the judge. Romero, emphasizes that, in contexts of corruption and organized crime, this presumption functions as an essential barrier against hasty accusations and media condemnations; however, its reversal dissolves it by forcing the affected party to refute a suspicion never rigorously proven. The citizen is thus left in the position of having to "speak" through documents or testimonies that could later be used as circumstantial evidence in parallel criminal proceedings. The presumption ceases to be a shield and becomes, functionally, an accusatory instrument wielded by the State against the very person it was meant to protect.

Subjected to the constitutional test of proportionality in its three stages -suitability, necessity, and strict proportionality- the reversal of the burden of proof fails at each stage. It is unsuitable because, in an economy marked by widespread informality, requiring formal proof of lawful origin does not reliably distinguish between illicit assets and those acquired through customary or familial transactions; it simply penalizes the absence of documentation that the legal system itself never required Bobadilla y Vásquez. It is unnecessary, since the State already has the entire investigative apparatus -financial intelligence units, bank records, cross-border cooperation- to prove illicit origin without forcing citizens to produce the very evidence that could incriminate them.

Weber [29], emphasizes that the constitutional standard of proof "beyond a reasonable doubt" cannot be diluted in procedures that, although formally civil, generate effects equivalent to a financial penalty. However, Legislative Decree 1373 operates with a much lower threshold: mere indications. This difference makes the investment disproportionate with respect to property rights and the right to defense. Ultimately, the balance of interests is disrupted. The marginal gain in recovery efficiency does not justify the systematic erosion of two fundamental guarantees, the presumption of innocence and property rights.

The harm to citizens who, through no fault of their own, lack the required formal records is manifestly excessive compared to the abstract objective of combating organized crime. Thus, the measure fails to demonstrate strict proportionality because it sacrifices core constitutional protections without showing that any less intrusive alternative -such as maintaining the ordinary burden on the tax authority while strengthening investigative tools- could achieve the legitimate goal with equal or greater effectiveness. The legislative option reveals not a calibrated response to the social problem, but an excessively broad mechanism that prioritizes administrative convenience over the structural limits imposed by the rule of law.

Comparative Perspectives and the Constitutional Correction

The Colombian Model: Autonomy with Guarantees

The forfeiture of ownership action in Colombia is directly grounded in Article 34 of the 1991 Political Constitution, which grants it its own legal nature. It is neither a criminal sanction nor a form of civil restitution, but rather an autonomous state power exercised in defense of public assets and social morality. As Rivero [30], explains, this constitutional basis confers true autonomy: its validity does not depend on a prior criminal conviction nor does it require the attribution of personal guilt; it operates as a real and patrimonial mechanism whose sole purpose is to eliminate titles that violate the constitutional order.

The affected party does not appear as a subject of punishment, but as the holder of a property right whose validity the legal system rejects upon verification of its illicit origin or illicit use [31]. This autonomy does not imply arbitrariness. Law 1708 of 2014 -the Forfeiture of Ownership Code- establishes concrete limits, expressly protecting third parties acting in good faith and without fault, thus making this protection an operational, not merely rhetorical, limit. Rivera [16] emphasizes that the two constitutional grounds -illicit origin and illicit destination- are interpreted restrictively, and that the initial burden of proof rests entirely with the State, which must provide concrete evidence before this burden can be reversed.

The affected party enjoys full procedural equality: the right to challenge the causal link, to provide evidence of lawful acquisition, and to invoke the constitutional guarantees of due process and property rights. Thus, the accusatory structure does not disappear but rather shifts to a non-criminal but rigorously protective framework. The judge decides not on administrative presumptions, but on a reasoned comparison between the State's assertion and the citizen's defense, maintaining the functional distinction between the citizen as the holder of rights and the State as the party responsible for justifying its actions.

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In short, Colombia demonstrates that legislative autonomy in asset forfeiture does not require sacrificing the principle of nemo tenetur (no one possesses property). By enshrining it in the Constitution and simultaneously strengthening the guarantees of the rule of law, it creates an effective instrument against organized crime without making citizens unwitting accomplices in their own financial losses. It is, therefore, a model that Peru has not yet incorporated into its constitution.

The Mexican Model: Constitutional Foundation with Safeguards

The Mexican constitutional order places the action for forfeiture of ownership in Article 22 of the Political Constitution of the United Mexican States, which expressly prohibits the confiscation of property, except for the constitutional exception of judicial forfeiture of property whose lawful origin cannot be proven [32]. This placement is not merely formal; it constitutes the main safeguard that transforms a potentially administrative or police measure into a strictly judicial act, subordinate to the constitutional prohibition of generalized confiscation.

As Rivera [16] points out, the action is activated solely through a lawsuit filed by the Public Prosecutor's Office, in a civil procedure independent of the criminal process. This preserves its patrimonial nature without transferring all the guarantees of the accusatory system, although it always requires a final judicial judgment as the sole legal basis for the transfer of the property to the State [33]. The two laws that regulate it -the 2009 Federal Law on Extinction of Ownership and the 2019 General Law on Extinction of Ownership- concretize this mandate by defining it as the loss of rights declared by court order and without compensation, limiting its application to assets whose lawful origin cannot be proven and that are directly or indirectly related to serious crimes such as corruption, organized crime, drug trafficking, extortion, human trafficking, or hydrocarbon-related offenses.

The protection lies in this double filter, the constitutional prohibition acts as an external limit, while the requirement of a court order functions as an internal procedural guarantee. Thus, extinction never becomes an automatic administrative confiscation but remains a judicial declaration subject to the constitutional text. In Jakobs' terms, this is a functional distinction: the State exercises autonomous patrimonial power, but one that is constitutionally channeled and judicially controlled to avoid falling into the confiscatory logic that Article 22 specifically prohibits. The result is a balance between state autonomy and respect for the principles of the rule of law.

The Imperative of Constitutional Correction

Machaca [34] points out that the right to defense is violated even in the initial phase of the procedure. The affected party is required to justify the lawful origin of their assets before the State has even provided any positive evidence of illegality, thus making the citizen the primary source of evidence for their own financial conviction. This configuration is not accidental; it stems directly from the legislative decision to conceive of the procedure as autonomous yet impose on the affected party an active obligation that the Constitution reserves exclusively for the prosecuting authority [35].

Furthermore, this reversal operates as a functional equivalent of a presumption of guilt, substantially eroding the substantive content of the presumption of innocence. [36] demonstrates that the process systematically infringes upon the constitutional rights to property and due process by imposing a disproportionate burden of proof that the affected party -frequently involved in Peru's informal economy- cannot reasonably fulfill, regardless of their actual guilt. Furthermore, the absence of a legal standard of proof equivalent to "beyond a reasonable doubt" allows judicial decisions to be based on mere circumstantial evidence, transforming what the legislator presents as a civil action into a de facto financial penalty, devoid of the guarantees required by the rule of law.

Eustaquio [37] empirically confirms, in the judicial district of La Libertad, a negative impact on the right to property, precisely because the investment exempts the State from its ordinary evidentiary obligation, while the citizen must reconstruct ex post a formal documentary history that the legal system itself never required at the time of acquisition. [38,39] complete the diagnosis: the lack of trained professionals and the doctrinal uncertainty regarding the relationship between asset forfeiture and the principle of double jeopardy generate chronic inefficiency and recurring violations of fundamental rights. In short, the Peruvian model requires a profound constitutional correction -not marginal reforms- through the restoration of the accusatory distribution of burdens, an indispensable condition for preserving the functional autonomy of the citizen as a rights holder vis-à-vis the State.

The Plenary Chamber of the Constitutional Court, in its judgment of June 27, 2025 (Case No. 00008-2024-PI/TC), issued a partial declaration of unconstitutionality that directly attacks the structural flaws of the reversal of the burden of proof originally established in Legislative Decree 1373. It declared sections 2.1 and 2.5 of Article II of the Preliminary Title unconstitutional for concurrently violating the right to property, the principle of non-retroactivity of laws, the presumption of innocence, and the right to due process -in particular-, by failing to guarantee an effective right to defense (Constitutional Court, 2025, paragraph 42). The ruling expressly rejects the legislative design that allowed the Public Prosecutor's Office to initiate asset forfeiture proceedings based on generic presumptions [40], transferring the entire burden of proof to the affected party without minimal prior justification.

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The Court bases its decision on the conviction that, although forfeiture is an autonomous and patrimonial action, it cannot function as an exception that suspends essential constitutional guarantees. It emphasizes that the State retains the initial obligation to provide concrete evidence of the illicit origin or destination of the asset; only after this minimum threshold can a modulated evidentiary dynamic emerge, but never one that transforms the citizen into the primary source of evidence against their own title. Through an interpretative ruling, the Constitutional Court limited the effects of the annulment to future cases, preserving legal certainty and unequivocally indicating that any subsequent regulation must be harmonized with the inalienable content of the presumption of innocence and the right to property.

Furthermore, the ruling emphasizes the exceptional nature of the action and its necessary connection to the fight against organized crime -not its indiscriminate application to any asset- and rejects interpretations that transform it into a parallel or substitute sanction, detached from constitutional limits. Thus, the Constitutional Court fulfills its corrective function as guardian of the Constitution, it does not eliminate the asset recovery mechanism but rather subordinates it to the structural principles of the Peruvian rule of law. This ruling, therefore, represents the urgent constitutional correction that the system required: it restores the principle of nemo tenetur even in non-criminal asset forfeiture proceedings and reaffirms that no objective of public interest, however legitimate, justifies the systematic erosion of fundamental guarantees. Case No. 00008-2024-PI/TC thus stands as a doctrinal and binding anchor for any future legislative reform in this area [41-44].

Conclusion

Legislative Decree 1373 introduces a radical reversal of the burden of proof that goes far beyond a mere procedural recourse. It establishes a structural presumption of illicitity regarding the affected assets, obligating the citizen -not the State - to demonstrate, retroactively and under profoundly unequal conditions, the legality of their wealth. Once the tax authority formulates mere indications of illicit origin or destination, the owner must reconstruct, under pressure and without equitable access to information, the entire economic history of the asset, using formal language required by the court.

Thus, the accusatory principle that the Peruvian Constitution has established as the cornerstone of all public power is subverted. The citizen ceases to be the passive holder of the presumption of innocence and becomes, against their will, a forced collaborator in constructing the case that justifies the extinction of their property rights. This dynamic has a particularly harsh impact on a society marked by widespread economic informality. Legitimate owners -those who acquired property through family, customary, or undocumented transactions- are unable to meet the evidentiary requirement, not because their title is illicit, but because the legal system never required them to generate the formal documentation now demanded under threat of confiscation.

The result is a systematic violation of the principle of nemo tenetur se ipsum accusare (no one is responsible for their own actions); the State absolves itself of its constitutional duty to prove illegality and shifts the active obligation to refute it onto the citizen. Furthermore, the law suffers from serious operational deficiencies, lacks an evidentiary standard equivalent to that required in criminal matters, judges and prosecutors lack sufficient specialization in these processes, and there are no effective guarantees for bona fide third parties. These shortcomings are not superficial: they reveal a legislative design that prioritizes administrative convenience over the inalienable guarantees of the constitutional rule of law.

Only a profound constitutional overhaul can restore balance, return the burden of proof to the tax authorities, preserve the asset-related autonomy of the forfeiture action, and complement it with legislative reforms, technical training for justice system personnel, and robust procedural safeguards. Only in this way will it cease to be an exception that undermines the constitutional rule and become a legitimate instrument for asset recovery, without sacrificing the structural principles of the Peruvian constitutional order.

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