

INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS

REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS

Vol. 6 - 2017



ISSN 2553-6869

International Journal of Open Governments
Revue internationale des gouvernements ouverts

Direction :
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ISSN : 2553-6869

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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DILEMMAS OF PARTICIPATORY BUDGETING FROM THE PERSPECTIVE OF THE POLISH LAW AND EXPERIENCE

by **Tomasz NOWAK**, Associate Professor at the University of
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This article presents dilemmas of participatory budgeting on the basis of the Polish budget law and on the basis of the Polish experience in this matter¹.

Three remarks should be made at the beginning. Firstly, nowadays the participatory budgeting is a permanent element of budget planning in the municipalities in Poland. This practice is already noticeable even in cities with a population of 50,000. It is therefore not only an issue of big cities.² Secondly, the characteristics of the participatory budgeting do not seem to be a matter of a dispute in Poland. They are as follows: 1) the participatory budgeting should include the whole community, not just a part of it; 2) the participatory budgeting is adopted as a result of a public discussion, which is open to all the residents of the municipality; 3) the specific amount of money is allocated by the residents; 4) the local authorities are bound by the choice of the residents; 5) the participatory budgeting is a long-term process, which means that it should not be limited to one year only³. Thirdly, legal aspects of the participatory budgeting are exclusively the subject of this study. However, it is obvious that the budget is also an institution of the political system, so it is impossible to completely ignore the political and social conditions related to the participatory budgeting. Furthermore, as regards the subject of the budget it is also impossible to move away from the issues relating to public management. However, legal issues remain the main reference point of this study, and aspects of the political, sociological and management are taken into account only as necessary aspects to determine the legal issues.

¹ In Poland, the terms of participatory budgeting and citizens budgeting are used. In both cases, this involves the same process in planning the budget, taking into account the participation of citizens in the selection and execution of tasks financed from the funds of the municipality. In this study the term of the participatory budgeting is used.

² The introduction of a participatory budget at the highest level of local government in Poland has been recently announced, i.e. in some voivodships. Voivodships are the level of local government in Poland that has the greatest territorial extent.

³ D. TYKWIŃSKA-RUTKOWSKA, P. GLEJT, PRAWNA regulacja budżetu obywatelskiego a jego praktyczna realizacja - czyli o uspołecznianiu wykonywania zadań publicznych na przykładzie rozwiń za przyj tych w Trójmieście, Gdańskie Studia Prawnicze, No. 34/2015, p. 318. Almost the same: E. DROZDOWSKI, Budżet partycypacyjny jako forma uczestnictwa społeczno lokalnej w tworzeniu budżetu, in: XXV lat przeobrażeń w prawie finansowym i prawie podatkowym - ocena dokonani i wnioski na przyszłość, red. Z. Ofiarski, Szczecin 2014, p. 228.

From a legal point of view, the following issues are important: to define the powers and to indicate the responsibility for drafting the budget, its adoption and for its implementation. The problem is therefore whether “general” powers of the local government bodies in the field of the budget are limited or are otherwise corrected by the participatory budgeting. The problem is also whether the participatory budgeting excludes or limits the responsibility of local authorities in the budget matters.

§ 1 – ABSENCE OF REGULATION RELATING TO PARTICIPATORY BUDGETING

In the Polish law, there is no regulation relating directly to participatory budgeting.

However, under Art. 7 of the Constitution of the Republic of Poland⁴, the organs of public authority must function on the basis of and within the limits of the law. Then, under Art. 5a of the Local Government Act⁵, local legislative bodies have the power to consult with local residents on major issues for the municipality. In practice, a procedure of consultation with local residents is used by the local authorities for the drafting and the adopting of the participatory budgeting, as well as for implementing it. It should be emphasized that the term: consultation indicates their non-binding nature. Therefore, local authorities are formally not subordinate to ‘the voice’ of the participatory factor in the drafting, the adoption and the implementation of the local budget. What is more, the drafting and the adoption of the participatory budgeting depend only on the will of the local authorities⁶.

In the Polish law, there is no regulation setting out the principles of drafting, adopting and implementing the local budget in its participatory part. Consequently, according to the Polish budget law, the “participatory” budget is not separate from the “general” budget of the municipality⁷. The “participatory” budget is a part of the “general” budget of the municipality. Furthermore, in the Polish budget law, there are no regulations that would determine the powers and the responsibilities specifically for the participatory part. Thus, currently the powers and responsibilities of the local authorities in the field of the “general” budget also apply to the participatory part.

Under the Polish budget law, drafting the budget is the exclusive competence of the local executive power (e.g. a mayor). Adoption of the budget is the exclusive competence of the local legislative

⁴ The Constitution of the Republic of Poland of April 2, 1997.

⁵ The Local Government Act of 27 April 2009 (J.L. od 2016, Item 446 - consolidated text, as amended).

⁶ D. SZĘCIEŃ, Uwarunkowania prawne budżetu partycypacyjnego w Polsce, *Finanse Komunalne*, No. 12/2012, p. 22.

⁷ J. SUKOWSKI, Przedwczesna ustawa o budżecie partycypacyjnym, in: *Aktualne problemy polskiego i litewskiego prawa konstytucyjnego*, red. D. Górecki, Łódź 2015, p. 121.

body. Since there are no regulations regarding the participatory budgeting, the participatory budgeting is dependent on the will of both the mayor and the legislative body. There is no legal means to force the local authorities to 'activate' participatory budgeting in the municipality.

However, the legislative body of the local government only adopts the final version of the budget on the basis of a draft submitted by the mayor. In practice, the legislative body must make only corrections to the draft. The participatory budgeting shall be "activated" only by the will of the mayor. Obviously, as the legislative body has the power to make corrections in the draft submitted by the mayor, the mayor must have initial acceptance from the legislative body for inclusion of the participatory part in the budget of the municipality. Otherwise, he would expose himself/herself to the risk of a breach of promise to "activate" the participatory budget.

Local authorities independently and by themselves regulate the procedure of participatory budgeting for their own municipalities. The authorities of the municipality of Lodz have set this procedure for the financial year 2017 as follows⁸.

Proceedings of the participatory budgeting take place during the consultations between the local authorities and the local residents. The object of the consultations is to present a proposal and the choice of tasks financed as the participatory part. These proposed tasks should be accomplished within one year.

The local authorities determine the amount of funds allocated to finance the tasks in the participatory part. Both the global amount and the amounts for financing tasks selected by citizens within particular districts of Lodz were indicated. It was claimed that the final amount would be determined by the legislative body of the local government, which is the competent authority to adopt the budget.

The proposed tasks are suggested by local residents. Every resident of the municipality has the right to suggest their own proposal (proposals).

The local authorities must analyze the feasibility of the task. These analyses are made by the budget department of the office supporting the local authorities and by the budget commission of the legislative body of the municipality. These analyses are made on the basis of criteria set by the mayor. These criteria are as follows. It must be examined whether the proposed task is one of the tasks of the municipality. It must be examined whether the task is aimed at satisfying the needs of a self-governing community. It must be examined whether the task is lawful. It must be examined whether the task is technically feasible, including a possibility of using the real property to carry out this task by the municipality. The amount of costs must be calculated

⁸ Edict of the President of Lodz of 19 February of 2016, No. 2914/VII/16 on conducting a public consultation on the participatory budget for 2017.

and the authority should evaluate it in terms of economy. It must be evaluated whether the task will generate costs in the future.

The final selection is made by the residents. The voting is open to all residents aged 16 years and older. The voting takes place within the prescribed period - using both paper cards and interactively.

Those proposals that receive the largest number of votes will be recommended for implementation until exhaustion of funds in the budget provided for the participatory part for a district of the municipality.

According to the Polish budget law, exclusive competence to implement the budget belongs to the local executive power (e.g. a mayor). In Polish practice of the participatory budgeting, tasks of a different nature are involved. Among them, there are tasks which are not different from “ordinary” tasks carried out by the local government, e.g. building a street. Then, they can be pursued as any task in a “normal” way of the implementation of the budget. However, sometimes the task selected for funding in the framework of the participatory budgeting has a specialized nature and it is clearly related to its promoters. For example, the task of the revitalization of the wilderness named Lublinek [*it is a proper noun*] was selected in the participatory budget for the city of Lodz for 2016. This task required the involvement of people who had knowledge of biology, ecology, etc. In such cases, it is appropriate to pass the implementation of these tasks, including spending money on their implementation, to their promoters. According to the Polish budget law, the grant is the means of the transfer of the competence to spend the public fund. The grant is subject to the conclusion of a contract between the local government and the recipient of the grant and therefore it requires the unanimous will of both parties. In this case, however, the conclusion of this agreement is the result of choosing the “participatory” task.

§ 2 – USE OF THE CONSULTATION PROCEDURE

The use of the consultation procedure for the participatory budgeting in Poland is not contested by the authorities competent for the review and supervision of the activities of the local government⁹. However, it seems that this procedure is used only because there is no other legal basis that would be more relevant to the participatory budgeting.

The use of the consultation procedure is not adequate for budgetary matters¹⁰.

⁹ According to Art. 171 para. 2 of the Constitution of the Republic of Poland, the organs exercising review over the activity of units of local government shall be: the Prime Minister and voivodes, and regarding financial matters, regional audit chambers.

¹⁰ Differently: J. SUŁKOWSKI, *Przedwczesna ustawa o budżecie partycypacyjnym...*, op. cit., p. 121.

Firstly, budgetary matters are connected with the powers that are expressly granted by the law to local authorities. The local authorities have exclusive competence in these matters. Launching the participatory budgeting limits the powers of the local authorities in budgetary matters. If the consultation procedure is already in progress, it is difficult to withdraw from the drafting and adopting of the participatory part. Although the consultation procedure is not binding, ignoring the voice of residents by the local authorities would disregard own commitment to the residents of the municipality. Thus, launching the consultation on the participatory budget changes the scope of local authority powers in budgetary matters. Since these powers are the result of the law, the rules of their limitation related to the participatory budget should also be regulated by the law.

Secondly, the consultation procedure gives local authorities a relatively high degree of discretion in deciding to launch the participatory budgeting and stipulating the scope of the factor of citizens' participation. Launching the consultation procedure depends entirely on the local authority. Only a local authority decides what is consulted with the residents. The local authority limits their own competence in budgetary matters on its own initiative and of their own will to enable the participation of citizens in deciding important issues for the whole community. The participatory budgeting is based only on a self-limitation of the local authority in budgetary matters. However, on the one hand, such a high degree of discretion of the local authorities can cause depriving the residents of this form of participation in public management. On the other hand, it is possible to abuse the right of consultation. Potentially, the right to enact the budget in its participatory part could be transferred to the extent that dissolves the powers of the local authorities in this regard. Potentially, it could also be consulted to perform tasks other than public tasks. Thus, the consultation procedure may lead to a distortion of the idea of a participatory budget. For these reasons, the consultation procedure should not be used to run the participatory budgeting.

The participatory budgeting should be the subject of a legal regulation. On the one hand, the participatory budgeting allows for the participation of residents in the selection of tasks financed and pursued by the municipality. On the other hand, both the executive and legislative bodies come from the general election. It should also be stressed that in Poland, the mayor has social legitimacy just as strong as the legislative body. The mayor is elected directly by all residents of the municipality. In contrast, the concept of the participatory budgeting does not presuppose to carry out universal suffrage. Of course, everyone can take part in the selection of tasks financed in the participatory part, but the choice is not made on the same principles as the election of the

mayor and councilors¹¹. Moreover, in practice only people who are promoting the tasks to be selected or persons directly interested in this task take part in voting on the selection of the “participatory” tasks. Thus, socially active individuals are promoted in this way, but this selection does not have a strong social legitimacy.

In addition, budgetary issues require some specialized knowledge of planning principles about the classification of revenue and expenditure, legal forms of spending and about taking out loans and credits. The local authorities possess this knowledge. The local authorities are organizationally prepared for drafting the budget, for its adoption and for its implementation¹². Shifting the budgetary matters to the citizens should not completely limit the competence of the local authorities in budgetary matters, because by their nature they are more capable of running financial management of the municipality.

Therefore, the legal regulation of the participatory budgeting is needed, as it determines the boundaries between representative democracy and direct democracy and participatory democracy¹³.

§ 3 – ACTIVE OR OBLIGATION PARTICIPATORY BUDGETING

“To activate” the participatory budgeting should not be an obligation imposed on the local authorities by law. It should not be the duty of the local authority.

On the one hand, the participatory budgeting expresses the need of citizens to co-participate in public management. An increase in such aspirations of citizens in the contemporary world is noted¹⁴. Moreover, the introduction of the participatory budgeting for the first time results in being continued in the following years¹⁵. On the other hand, the participatory budgeting is not a natural right of residents of the municipality. Powers in budgetary matters are vested in the local authorities. In addition, the local authorities, especially the mayor, have better knowledge of the financial situation of the municipality than its inhabitants. The local authority should not be limited in creating the budget, so the decision on ‘activating’ the participatory part should belong to these bodies.

¹¹ T. DUBOWSKA-ROMANOWSKA, Budżet et obywatelski jako instytucja prawa samorządowego, *Przedsiębiorstwo i Zarządzanie*, 2015, No. 3, part 3 (Vol. XVI), p. 306.

¹² T. DUBOWSKA-ROMANOWSKA, Budżet et obywatelski jako instytucja prawa samorządowego..., op. cit., p. 306.

¹³ Differently: J. SUKOWSKI, *Przedwczesna ustawa o budżecie partycypacyjnym...*, op. cit., p. 122. The author points out that a legal regulation is in conflict with the social initiative, which is the participatory budgeting. In addition, the author argues that the legal regulation of participatory budget implies unification of the rules, which excludes consideration of individual differences in local communities. The author also doubts the effectiveness of such a regulation.

¹⁴ T. DUBOWSKA-ROMANOWSKA, Budżet et obywatelski jako instytucja prawa samorządowego..., op. cit., p. 304.

¹⁵ *Ibidem*, p. 309.

For these reasons, the participatory budgeting should not be mandatory.

Although the launch of the participatory budgeting depends only on the will of the local authorities, legal rules are required to indicate how to manage it. The legal regulation of the participatory budgeting should determine the manner of its drafting, adoption and implementation. The purpose of this regulation should be to protect the community against irregularities in the management of municipal finances (e.g. against the growth of the municipal debt) and against abuse of the participatory budgeting for the attainment of particular interests¹⁶. The purpose of this regulation should be to protect the “general” budget against its domination by its participatory part. “General” budget has a basic character as it covers the entire financial management of municipalities and all of their tasks. For this reason, it is adopted and executed by the elected authorities (authorities coming from general elections)¹⁷.

§ 4 – NEED OF CRITERIA FOR SELECTING TASKS

It seems obvious that the regulation of the participatory budgeting should specify criteria for selecting tasks financed in this section of the local budget. These must be the criteria relating to the needs of the local community. The participatory budgeting cannot be an instrument to achieve a personal interest. Of course, the participatory budgeting supports active participation, so in practice the selected tasks are closer to their promoters than to the general population of the municipality. However, potentially every citizen should benefit from this task.

The participatory budgeting should not include tasks whose accomplishment is the duty of local authorities. If the law requires the performance of specific tasks from the municipalities, then these tasks should be implemented regardless of the will of the inhabitants and regardless of the will of the local authorities. The participatory budgeting is an instrument for ensuring public participation in the management of the proposing and choosing the tasks to be financed by the municipality. If the tasks are compulsory, they are not subject to a proposal and to a choice. These tasks are performed by local authorities regardless of their choice in the procedure of the participatory budgeting. The participatory budgeting is to include the tasks proposed at grassroots initiatives and such tasks are not required by law.

It also seems obvious that the local authorities should participate in the selection of “participatory” tasks. The local authorities represent the community (all the residents of the municipality), therefore they cannot avoid responsibility for the budget, including the participatory part. The local authorities should make

¹⁶ *Ibidem*, p. 307.

¹⁷ *Ibidem*, pp. 306-308.

a preselection of tasks, which are then selected in voting of the local residents. As already indicated above, in Polish practice of the participatory budgeting, a mayor and the legislative body usually cooperate in the selection of tasks covered by the participatory part.

It also seems that the criteria to determine the amount of funds allocated to a participatory part must be established by law. In this regard, two factors should be taken into account. Firstly, the amount to be a participatory part cannot be too high. The local authorities should decide on the allocation of the vast majority of public funds, as the authorities come from the general election. It is important that the local authorities are obliged to implement many of the compulsory tasks and these should be financed in the first instance. The “general” budget rather than the participatory budgeting is fundamental as an act of financial management of the municipality¹⁸. Secondly, the current financial situation of the municipality should be taken into account to determine the amount in the participatory part. The participatory part may not cause the collapse of municipal finance. Currently in Poland, the amount of funds handed over to the participatory part is determined by the mayor.

It also seems that the extent to which the local authorities are bound by the choice made by the people should be regulated by the law. While starting the procedure of the participatory budgeting depends only on the will of the local authorities, the procedure already started should result in the adoption of the budget taking into account the participatory part and the task selected in popular voting. “To activate” the procedure for the participatory budgeting is a kind of commitment of the local authorities in relation to the population of the municipality. It is a pledge to accept the selection of residents in financial matters of the municipal budget¹⁹.

§ 5 – LEGAL REGULATION OF IMPLEMENTATION

The legal regulation of the budget implementation involves not only vesting competences but also ordaining responsibility in this regard. This part of the Polish budget law sets forth spending rules. Primarily, the mayor has no obligation to spend the amounts stipulated in the budget. The amount set forth in the budget is a spending limit for a particular task²⁰. If the completed task costs less than stipulated in the budget, it is acceptable and desirable not to exhaust the expenditure limit. Furthermore, there are legal institutions that allow amendments to the budget during its implementation. These amendments may consist in blocking spending on specific tasks or in changing tasks from those

¹⁸ *Ibidem*, p. 310.

¹⁹ *Ibidem*, pp. 308-309.

²⁰ Art. 52 Sec. 1 Subsec. 2 of the Public Finance Act (the Public Finance Act of 27 April 2009, J.L. od 2016, Item 1870 - consolidated text, as amended).

intended by the legislative body of the local authority. In addition, the regulation implementing the budget determines the legal forms used in this process.

The implementation of the participatory part of the local budget also requires its legal regulation²¹. If the participatory budgeting is drafted and adopted, the implementation of the budget also requires separate and special rules relating to this section. The scope of the powers conferred by the mayor in the implementation of the participatory part may not be the same as for the 'general' budget. First, the participatory budgeting needs to take into account the participation of residents also in the implementation of the tasks in this section. Since the local authorities allow the financing of the tasks chosen by the residents, they cannot deny the influence of residents on how to implement these tasks. For that reason, this choice, even the preselected task, made by local government should imply a manner of implementation. Especially, the participation of the promoters of tasks of the participatory part should be taken into account during the implementation of the budget. Furthermore, the applicability of legal institutions resulting in a change to the budget in the course of its implementation should be limited if the implementation is subject to the participatory part. Otherwise, it would be too easy for the local authorities to withdraw from the choice of the residents. The participatory budgeting would then become apparent.

The grant is a legal form of spending public funds, which ensures the participation of the promoters of the tasks carried out in the participatory part. Grants are funds from the state budget, from the local budget and from the other state funds which are earmarked under the Public Finance Act, under separate laws or under international agreements for the financing or co-financing of public tasks and which are subject to special rules of spending, accounting and settlements. The beneficiary of a grant may also be a private entity²². This entity performs the subsidized task. From a legal point of view, the grant requires a contract²³. It is therefore not possible to impose grants and tasks to be performed. However, the entity that receives a grant is usually interested in fulfilling this task. Typically, the task is one of the goals of this entity. Similarly, the promoters of tasks selected to the participatory part seem to be prepared to carry out these tasks on their own with support in the form of grants. After all, they

²¹ However, in Poland the view is presented that the participatory budgeting applies only to the drafting and to the adoption of the local budget. Making spending belongs exclusively to the mayor. The mayor is responsible for making the expenditure. The citizen factor does not participate in the implementation of the budget, even in the participatory part. Such was the position taken by R. Kowalczyk in: R. Kowalczyk, Wybrane formy partycypacji społecznej w procesie wydatkowania środków publicznych z budżetu gminy, in: *JEDNOSTKA wobec działań administracji publicznej*, red. E. Ura, E. Feret, S. Pieprzny, Rzeszów 2016, p. 670.

²² Art. 250 of the Public Finance Act.

²³ Art. 250 of the Public Finance Act.

present a proposal for this task and have to identify all the factors that allow its implementation. The role of the entity that receives a grant, “fits” in the role of the promoter of the task carried out in the participatory part. On the other hand, for both grants and the participatory part, the role of the public authority is limited to the control of the task performance and the spending of public funds. The mayor is not released from the responsibility for the implementation of the participatory part. The beneficiary of a grant must submit a report of the incurred expenditure. The mayor is obliged to verify this report, and in case of an irregularity the mayor is obliged to request a refund of public funds spent inappropriately. In this way, the local authority takes responsibility for the performance of the subsidized task. Therefore, the application of the grant as a form of pursuit of the participatory part allows for the participation of the citizen factor, and also delegates ‘general’ powers on the implementation of the budget to the bodies of the local authorities.

The powers of local authorities in regards to an amendment to the participatory part should also be regulated by the law.

The mayor may be authorized by the legislative body to introduce changes to the budget concerning the transfer of public funds between tasks²⁴. In this way, funds are allocated in a different way than in the adopted budget. The budget can be amended on the mayor’s initiative²⁵. In this case composition of expenditure may also be changed. In addition, the mayor has the power to block spending (due to irregularities in spending), which means the prohibition of making the expenditure provided in the budget of the municipality²⁶. From a legal point of view, it may also cause changes to the participatory part. These powers can be exercised only by the local authority. Under the current law these powers do not require the participation of the civil factor.

It seems, however, that the legal regulation of the participatory budgeting should specify the rules to make changes to the budget during its implementation – in relation to its participatory part. The participatory part reflects citizens’ activity and illustrates the will of the civil factor. It seems that the mayor has limited power to make changes or revisions in the participatory part during the course of the implementation of the budget. In the Polish budget law, the financial institutions are allowed to change the allocation of expenditure during the course of the budget implementation, and even to change legal instruments that can ‘block’ spending. The application of these instruments belongs to the mayor. Because local authorities undertake to carry out the “participatory” tasks, the mayor cannot freely use these instruments for the participatory part. This could only happen in exceptional cases, especially in the case of risk of the municipal finance collapse. But even in such cases, the participatory part can

²⁴ Art. 258 of the Public Finance Act.

²⁵ Art. 233 of the Public Finance Act.

²⁶ Art. 260 of the Public Finance Act.

be changed only in the last instance²⁷. Of course, the irregularities in the performance of the tasks chosen by the people and the irregularities in the spending of funds allocated for this purpose can be the cause of the mayor's withholding or suspending the disbursement of these funds.

CONCLUSION

In summary, currently the local authorities in Poland are not obliged to “activate” the participatory budgeting in their communities. Therefore, from the legal point of view, the – participatory budgeting in Poland cannot exclude the competence and the responsibility of the local authorities in the field of drafting, adopting and implementing the local budget. Consequently, the participatory budgeting, if “activated”, does not transfer the responsibility to the ‘promoters’ of the tasks financed in the participatory part.

However, it seems that the participatory budgeting, if “activated” in the municipality, should impose restrictions on the local authorities. So, if the procedure of “creating” the participatory budget has already been started, the local authority may omit the participatory part in the final which means the adopted version of the local budget only in exceptional situations. The local authorities can “block” spending funds from the participatory part also only in exceptional cases. Otherwise, the local authorities would pervert the sense of the participatory budgeting. Furthermore, the implementation of the participatory part by the local authorities should use these ways of spending that give promoters impact on how the “participatory” task is pursued preferably. In this regard, the local authorities should allow active citizens to cooperate in the public management, because the essence of the participatory budgeting is cooperation between authorities and citizens in the public management.

Finally, the participatory budgeting can lead to the repeal of competence and responsibility of the local authorities for the adoption and for the implementation of the budget “as a whole”, and therefore also – in the participatory section. However, in this area it is necessary to ensure the participation of the “citizen” factor, because that is the meaning of the municipal budget management. The legal regulation of the participatory budgeting should be a balance between these two needs and values. It means balance between representative local authorities and activity of residents in the field of public management.

²⁷ T. DUBOWSKA-ROMANOWSKA, *Budżet obywatelski jako instytucja prawa samorządowego...*, op. cit., p. 308.

